No. 15-8544

Title:	Travis Beckles, Petitioner v. United States
Docketed:	March 14, 2016
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Nos.:	(13-13569)
Decision Date:	September 29, 2015
Rehearing Denied:	February 11, 2016

Questions Presented

---Date---	------Proceedings and Orders----------
Mar 9 2016	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 13, 2016)
Apr 7 2016	Order extending time to file response to petition to and including May 13, 2016.
May 10 2016	Letter dated May 6, 2016, received from counsel for petitioner waiving the 14-day waiting period for the filing of a reply brief pursuant to Rule 15.5.
May 13 2016	Brief of respondent United States in opposition filed.
May 18 2016	DISTRIBUTED for Conference of June 2, 2016.
May 23 2016	Reply of petitioner Travis Beckles filed. (Distributed)
Jun 6 2016	DISTRIBUTED for Conference of June 9, 2016.
Jun 8 2016	Supplemental brief of petitioner Travis Beckles filed. (Distributed)
Jun 13 2016	DISTRIBUTED for Conference of June 16, 2016.
Jun 20 2016	DISTRIBUTED for Conference of June 23, 2016.
Jun 27 2016	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. Justice Kagan took no part in the consideration or decision of this motion and this petition.
Aug 11 2016	Adam K. Mortara, Esquire, of Chicago, Illinois, is invited to brief and argue this case, as amicus curiae, in support of the judgment below on Question 2 presented by the petition. Justice Kagan took no part in the consideration or decision of this order.
Aug 11 2016	Joint appendix filed. (Statement of costs filed)
Aug 11 2016	Brief of petitioner Travis Beckles filed.
Aug 16 2016	The time to file respondent's brief on the merits is extended to and including September 19, 2016.
Aug 16 2016	The time to file the brief of Court-appointed amicus curiae in support of the judgment below on Question 2 presented by the petition is extended to and including October 21, 2016.
Aug 16 2016	Briefs of other amici curiae in support of the judgment below on Question 2 presented by the petition are to be filed on or before October 28, 2016.
Aug 18 2016	Brief amici curiae of Federal Public and Community Defenders, and the National Association of Federal Defenders filed.
Aug 18 2016	Brief amicus curiae of Scholars of Criminal Law, Federal Courts, and Sentencing filed.
Sep 19 2016	Brief of respondent United States filed.

Oct 20 2016	Motion for enlargement of time for oral argument and for divided argument filed by respondent United States.
Oct 21 2016	SET FOR ARGUMENT on Monday, November 28, 2016
Oct 21 2016	Brief of Court-appointed amicus curiae in support of the judgment below on Question 2 filed.
Oct 26 2016	CIRCULATED.
Nov 1 2016	Record requested from the U.S.C.A. 11th Circuit.
Nov 14 2016	Motion for additional time to argue by respondent GRANTED. and the time is divided as follows: 25 minutes for petitioner, 25 minutes for respondent, and 15 minutes for the Court-appointed amicus curiae. Justice Kagan took no part in the consideration or decision of this motion.
Nov 15 2016	Record received from the U.S.D.C. Southern District of Florida 1 Envelope. Also received from the Southern District of Florida are SEALED documents, these records are electronic.
Nov 17 2016	Reply of petitioner Travis Beckles filed. (Distributed)
Nov 21 2016	Reply of respondent United States filed. (Distributed)
Nov 28 2016	Argued. For petitioner: Janice L. Bergmann, Assistant Federal Public Defender, Fort Lauderdale, Fla. For respondent: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D. C. For Court-appointed amicus curiae: Adam K. Mortara, Chicago, Ill. (Appointed by this Court.)
Mar 6 2017	Adjudged to be AFFIRMED. Thomas, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Breyer, and Alito, JJ., joined. Kennedy, J., filed a concurring opinion. Ginsburg, J., and Sotomayor, J., filed opinions concurring in the judgment. Kagan, J., took no part in the consideration or decision of the case.
Apr 7 2017	JUDGMENT ISSUED.

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RECORD AND BRIEFS

No: 15-8544

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

TRAVIS BECKLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
FILED
MAR 09 2016
OFFICE OF THE CLERK

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Travis Beckles, pursuant to SUP CT. R. 39.1, respectfully moves for leave to file the accompanying petition for writ of certiorari in the Supreme Court of the United States without payment of costs and to proceed *in forma pauperis*.

Petitioner was previously found financially unable to obtain counsel and the Federal Public Defender of the Southern District of Florida was appointed to represent Petitioner pursuant to 18 U.S.C. § 3006A. Therefore, in reliance upon RULE 39.1 and § 3006A(d)(6), Petitioner has not attached the affidavit which would otherwise be required by 28 U.S.C. § 1746.

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

Fort Lauderdale, Florida
March 9, 2016

By: _____
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

TRAVIS BECKLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

Supreme Court, U.S.
FILED
MAR 09 2016
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RECEIVED
MAR 14 2016

QUESTIONS PRESENTED FOR REVIEW

Johnson v. United States, 135 S. Ct. 2551 (2015), deemed unconstitutionally vague the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii) (defining "violent felony"). The residual clause invalidated in *Johnson* is identical to the residual clause in the career-offender provision of the United States Sentencing Guidelines, U.S.S.G. § 4B1.2(a)(2) (defining "crime of violence").

The questions presented are:

1. Whether *Johnson* applies retroactively to collateral cases challenging federal sentences enhanced under the residual clause in U.S.S.G. § 4B1.2(a)(2)?

2. Whether *Johnson*'s constitutional holding applies to the residual clause in U.S.S.G. § 4B1.2(a)(2), thereby rendering challenges to sentences enhanced under it cognizable on collateral review?

3. Whether mere possession of a sawed-off shotgun, an offense listed as a "crime of violence" only in the commentary to U.S.S.G. § 4B1.2, remains a "crime of violence" after *Johnson*?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

No:

TRAVIS BECKLES,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Travis Beckles respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's unpublished opinion reaffirming its denial of Mr. Beckles's 28 U.S.C. § 2255 motion to vacate judgment notwithstanding *Johnson v. United States*, 135 S. Ct. 2551 (2015), is reported at 616 Fed. Appx 415 (11th Cir. 2015), and included in the Appendix at A-1. The Eleventh Circuit's unreported order denying Mr. Beckles's petition for rehearing en banc is included in the Appendix at A-2.

This Court's decision granting Mr. Beckles's petition for writ of certiorari, vacating the Eleventh Circuit's prior decision denying his § 2255 motion, and remanding for reconsideration in light of *Johnson* is reported at 135 S. Ct. 2928 (2015), and included in the Appendix at A-3. The Eleventh Circuit's unpublished pre-*Johnson* opinion affirming the denial of Mr. Beckles's § 2255 motion is reported at 579 Fed. Appx. 833 (11th Cir. 2014), and included in the Appendix at A-4.

The District Court's unpublished order granting the government's motion for reconsideration and denying Mr. Beckles's § 2255 motion is included in the Appendix at A-5. The District Court's unpublished order granting Mr. Beckles's § 2255 motion and ordering resentencing is included in the Appendix at A-6. The magistrate judge's unpublished report recommending denial of Mr. Beckles's § 2255 motion is included in the Appendix at A-7.

The Eleventh Circuit's published opinion affirming Mr. Beckles's conviction and sentence on direct appeal is reported at 565 F.3d 832 (11th Cir. 2009), and included in the Appendix at A-8.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals affirming the district court's denial of Mr. Beckles's 28 U.S.C. § 2255 motion was entered on September 29, 2015. The court of appeals denied Petitioner's timely petition for rehearing *en banc* on February 11, 2016. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY AND GUIDELINES PROVISIONS INVOLVED

Section 924(e)(2)(B) of Title 18 states, in pertinent part:

§ 924. Penalties

* * *

(e)(2) As used in this subsection –

* * *

(B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, , that –

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; ...

18 U.S.C. § 924(e)(2)(B).

United States Sentencing Guideline 4B1.1(a) states, in pertinent part:

§ 4B1.1. Career Offender

(a) **A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.**

(b) **Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.**

Offense Statutory Maximum	Offense Level*
(A) Life	37

(B)	25 years or more	34
(C)	20 years or more, but less than 25 years	32
(D)	15 years or more, but less than 20 years	29
(E)	10 years or more, but less than 15 years	24
(F)	5 years or more, but less than 10 years	17
(G)	More than one year, but less than 5 years	12.

*If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

U.S.S.G. § 4B1.1(a).

United States Sentencing Guideline 4B1.2 states, in pertinent part:

§ 4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

* * *

Commentary

Application Notes:

1. For purposes of this guideline –

* * *

Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a "crime of violence."

* * *

U.S.S.G. § 4B1.2.

INTRODUCTION

Johnson v. United States, 135 S. Ct. 2551 (2015), held unconstitutionally vague the residual clause in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii). In *Welch v. United States*, No. 15-6418 (U.S. cert. granted Jan. 8, 2016), this Court will decide whether *Johnson* announced a new "substantive" rule of constitutional law retroactively applicable to cases on collateral review. *Welch*, however, will consider that issue in the context of a 28 U.S.C. § 2255 motion brought by a federal prisoner challenging an ACCA-enhanced sentence. This petition presents the closely-related question whether *Johnson* applies retroactively to collateral cases brought by federal prisoners, like Petitioner, who challenge federal sentences enhanced under the identically-worded and analytically-indistinct residual clause contained in the United States Sentencing Guidelines, U.S.S.G. § 4B1.2(a)(2).

Specifically, this petition presents three critical questions requiring the Court's prompt resolution: (1) whether *Johnson* applies retroactively in the context of the Guidelines's residual clause; (2) whether *Johnson* renders the Guidelines's residual clause void for vagueness, such that *Johnson*-based challenges in that context are cognizable in § 2255 proceedings; and (3) whether, post-*Johnson*, a federal sentence may nonetheless be enhanced for mere possession of a sawed-off shotgun because that offense is listed as a crime of violence in the Guidelines commentary.

Prompt resolution of these issues is required because the one-year statute of limitations governing collateral *Johnson* claims will expire on June 26, 2016. Given

the looming statute of limitations, the Court should resolve these issues this Term for many of the same reasons it granted *certiorari* and expedited briefing in *Welch*. Indeed, depending on the Court's decision in *Welch*, a *per curiam* opinion on these issues without full briefing or oral argument may be appropriate. Regardless, this petition affords the Court an opportunity to decide all three of these important questions this Term, and thereby provide critical guidance to lower courts likely to be confronted between now and June 26, 2016 with thousands of § 2255 motions filed by federal prisoners whose sentences were enhanced using the Guidelines's residual clause.

STATEMENT OF THE CASE

1. In 2007, after a Miami detective placed Mr. Beckles in a police car outside his girlfriend's apartment, the girlfriend asked the detective to remove a gun from the bedroom. The detective searched the bedroom but was unable to find a gun. After questioning Mr. Beckles, the detective again searched the bedroom but was still unable to find a gun. Finally, the detective took Mr. Beckles into the apartment, and Mr. Beckles helped the officer recover a shotgun from under a mattress. A jury later convicted Mr. Beckles of one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

2. The Presentence Investigation Report concluded that the unlawful possession of a sawed-off shotgun qualified as a "crime of violence," under U.S.S.G. § 4B1.2(a), and because Mr. Beckles had two prior felony convictions (for controlled

substance offenses that are not at issue in the instant petition), his sentence should be enhanced under the career offender provision found in U.S.S.G. § 4B1.1.

Possession of a sawed-off shotgun is listed as a "crime of violence" not in the text of the guideline itself, but in the commentary found in Application Note 1 to § 4B1.2. That commentary states, in pertinent part, that "[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence' " U.S.S.G. § 4B1.2 cmt. n.1. That offense was included as a "crime of violence" in the commentary to § 4B1.2 in 2004 by the United States Sentencing Commission because, at that time, "[a] number of courts ha[d] held that possession of certain . . firearms, such as a sawed-off shotgun, is a 'crime of violence' due to the serious potential risk of physical injury to another person." U.S.S.G. App. C, amend. 674 (Nov. 1, 2004).

When Congress established the Sentencing Guidelines and the United States Sentencing Commission, it directed the Commission to "assure that the guidelines" for prisoners who qualify as career offenders "specify a sentence to a term of imprisonment at or near the [statutory] maximum authorized." 28 U.S.C. § 994(h). Section 4B1.1 of the Sentencing Guidelines implements this directive. *See* U.S.S.G. § 4B1.1 & cmt. n.3. As a result, the career offender enhancement dramatically escalates federal sentencing ranges under the Sentencing Guidelines. Here, Mr. Beckles's guideline imprisonment range without the career offender enhancement was 180 months.[1] As a career offender,

---

[1] Mr. Beckles's guideline sentencing range was 180 months because the PSI also concluded that he had three prior drug offenses that required imposition of a

his guideline imprisonment range increased to 360 months to life, and the district court sentenced him to a 360-month term of imprisonment.[2]

3. On direct appeal, the United States Court of Appeals for the Eleventh Circuit rejected Mr. Beckles's argument that his sentence was wrongly enhanced under the career offender provision in § 4B1.1 because possession of a sawed-off shotgun is not a "crime of violence" under § 4B1.2(a). *United States v. Beckles*, 565 F.3d 832, 842-44 (11th Cir. 2009). In reaching this conclusion, the court of appeals relied upon the commentary found in Application Note 1 to § 4B1.2. *See id.* at 842. This Court denied Mr. Beckles's petition for writ of certiorari. *Beckles v. United States*, 130 S. Ct. 272 (2009).

4. Mr. Beckles timely filed a 28 U.S.C. § 2255 motion to vacate sentence in which he argued that possession of a sawed-off shotgun is not a "crime of violence" under § 4B1.2(a) and he was therefore wrongly sentenced as a career offender. The motion was referred to a magistrate judge who issued a report recommending that the motion be denied because Mr. Beckles's challenge to his career offender enhancement was not cognizable in a § 2255 motion. App. A-7 at 13-34. In March 2013, however, the district court sustained Mr. Beckles's objections to the magistrate judge's report, and determined that Mr. Beckles's challenge was cognizable. App. A-3, *passim*.

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mandatory-minimum 15-year sentence as an armed career criminal under 18 U.S.C. § 924(e). Mr. Beckles's ACCA enhancement is not at issue in this petition.

[3] The district court later reduced Mr. Beckles's term of imprisonment to 216 months for reasons not relevant here.

Because the government had not contested Mr. Beckles's argument that possession of a sawed-off shotgun did not qualify as a crime of violence under U.S.S.G. § 4B1.2(a), *id.* at 11, the district court concluded that Mr. Beckles's sentence was wrongly enhanced under the career offender provision, granted the motion, *id.* at 18, and ordered that Mr. Beckles be resentenced without the career offender enhancement.

While Mr. Beckles awaited resentencing by the district court, however, the Eleventh Circuit decided *United States v. Hall*, 714 F.3d 1270 (11th Cir. 2013). *Hall* held U.S.S.G. § 4B1.2's commentary stating that possession of a sawed-off shotgun qualifies as a "crime of violence" is binding on the federal courts under *Stinson v. United States*, 508 U.S. 36 (1993):

> Although we would traditionally apply the categorical approach to determine whether an offense qualifies as a "crime of violence," we are bound by the explicit statement in the commentary that "[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (*e.g.*, a sawed-off shotgun .) is a 'crime of violence.'" U.S.S.G. § 4B1.2 cmt. n.1. Hall does not satisfy either of *Stinson*'s stringent exception requirements, as the commentary provision violates neither the Constitution nor any other federal statute, and it is not inconsistent with, or a plainly erroneous reading of, the guideline text itself. Moreover, because the commentary to § [4B1.2] defines "crime of violence" very differently than the ACCA does, we cannot say that the definition of 'crime of violence' provided in the commentary to § [4B1.2] is a plainly erroneous reading of the guideline.

Id. at 1274 (first ellipsis added; internal quotation marks omitted).

The government moved the district court to reconsider its decision granting Mr. Beckles's § 2255 motion in light of *Hall*. On June 14, 2013, the district court granted

reconsideration, set aside its prior final judgment in Mr. Beckles's § 2255 proceeding, and denied his § 2255 motion. App. A-5.

5. Mr. Beckles appealed the denial of his § 2255 motion to the Eleventh Circuit, and argued that possession of a sawed-off shotgun is not a "crime of violence" under § 4B1.2(a). He acknowledged, however, the prior contrary ruling in *Hall*. On September 5, 2014, the Eleventh Circuit issued a *per curiam* opinion affirming the district court's denial of Mr. Beckles's § 2255 motion, noting that it had already ruled on the issue in *Hall*:

> In *Hall*, we decided that possession of an unregistered sawed-off shotgun, as defined by 26 U.S.C. § 5861(d), qualifies as a 'crime of violence' under § 4B1.2(a), based on the commentary to that guideline provision. *Hall*, 714 F.3d at 1273. We explained that the commentary was controlling because the commentary did not violate the Constitution or federal statute, and was not inconsistent with, or a plainly erroneous readying of, the guideline text. *Id.* at 1273-74.
>
> Here, Beckles's claim fails on the merits under *Hall*, and we are bound by that decision.

App. A-4 at 4.

6. After this Court granted review in *Johnson* on the question of whether possession of a sawed-off shotgun was a "violent felony" under the ACCA, Mr. Beckles petitioned for writ of certiorari on the closely-related question of whether that same offense qualified as a crime of violence under § 4B1.2(a)(2). *See Travis Beckles v. United States*, No. 14-7390, Cert. Ptn. at i (U.S. filed Dec. 2, 2014). After this Court decided *Johnson*, it granted the writ, vacated the Eleventh Circuit's judgment, and

remanded Mr. Beckles's case to the court of appeals for further consideration in light of that decision. *Beckles v. United States*, 135 S. Ct. 2928 (2015); App. A-3.

7. Post-*Johnson*, but before it considered Mr. Beckles's case on remand, the Eleventh Circuit effectively limited the scope of collateral relief available to federal prisoners under that decision by holding that the Sentencing Guidelines cannot be unconstitutionally vague, and thus rejected a *Johnson*-based challenge to the residual clause in U.S.S.G. § 4B1.2(a)(2). *See United States v. Matchett*, 802 F.3d 1185, 1194-96 (11th Cir. 2015), *ptn. for rhg. en banc filed* (October 13, 2015).

8. Eight days after it decided *Matchett*, the Eleventh Circuit again rejected Mr. Beckles's challenge to his career offender sentence. *See Beckles v. United States*, 616 Fed. Appx. 415 (11th Cir. 2015) (*per curiam*); App. A-1. As it did pre-*Johnson*, the court of appeals cited to *Hall* and Application Note 1 in the commentary to § 4B1.2 to support its conclusion that "Beckles's offense of conviction – unlawful possession of a sawed-off shotgun – constitutes a 'crime of violence' under [U.S.S.G. §] 4B1.1." App. A-1 at 2. Without citing *Matchett*, the Eleventh Circuit specifically determined that *Johnson* was inapposite, stating:

> The Supreme Court's decision in *Johnson* – in which the Supreme Court struck down, as unconstitutionally vague, the residual clause of the Armed Career Criminal Act ("ACCA") – does not control this appeal. Beckles was sentenced as a career offender based *not* on the ACCA's residual clause, but based on express language in the Sentencing Guidelines classifying Beckles's offense as a 'crime of violence.' *Johnson* says and decides nothing about career-offender enhancements under the Sentencing Guidelines or about the Guidelines commentary underlying Beckles's status as a career-offender.

> Our decision in *Hall* remains good law and continues to control this appeal.

App. A-1 at 3.

9. On January 8, 2016, this Court granted the petition for writ of certiorari in *Welch v. United States*, No. 15-6418. *Welch* presents the question whether *Johnson* applies retroactively for purposes of an initial § 2255 motion challenging an ACCA-enhanced sentence.

10. On the same day that this Court granted the petition in *Welch*, the United States Sentencing Commission voted to amend the Sentencing Guidelines by deleting the residual clause from § 4B1.2(a)(2). However, the Commission voted *not* to make that forthcoming amendment retroactively applicable. *See* U.S. Sentencing Comm'n, *Proposed Amendment: "Crime of Violence" and Related Issues* (Jan. 8, 2016), available at www.ussc.gov.

11. On February 11, 2016, the Eleventh Circuit denied Mr. Beckles's timely petition for rehearing *en banc*, and on February 19, 2016, issued its mandate.

REASONS FOR GRANTING THE WRIT

I. Whether *Johnson* applies retroactively in the context of the Guidelines's residual clause presents an important question warranting this Court's prompt consideration.

A. Prompt resolution of the retroactivity question will help avoid confusion in the lower courts and the needless expenditure of scarce judicial resources.

The Court should decide *Johnson*'s retroactivity in the Guidelines context this Term for the same pressing reason it was urged to do so in the ACCA context. Specifically, there is an ever-shortening one-year statute of limitations, requiring federal prisoners to file any *Johnson*-based § 2255 motion by June 26, 2016 – one year from the date *Johnson* was decided. Critically, that deadline remains fixed even if the Court were to hold in a later case that *Johnson* did indeed apply retroactively in the Guidelines context. *See* 28 U.S.C. § 2255(f)(3); *Dodd v. United States*, 545 U.S. 353, 357 (2005). Due to the statute of limitations, it is likely that thousands of federal prisoners whose sentences were enhanced under § 4B1.2(a)(2)'s residual clause will be forced to file § 2255 motions between now and June 26, 2016, in order to preserve their potential right to relief under *Johnson*. Those filings, the vast majority of which would be *pro se*, will place a great strain on the federal judiciary. *See infra*, § I.B. (discussing data).

The retroactivity question takes on added significance in light of the United States Sentencing Commission's proposed amendment to § 4B1.2, which, absent action by Congress, will take effect August 1, 2016. That amendment will delete the residual clause from § 4B1.2(a)(2), but the Commission voted not apply the amendment retroactively. It therefore provides federal prisoners no avenue for relief from their potentially unconstitutional Guidelines sentences.

Welch is unlikely to decide the retroactivity question for those federal prisoners who were sentenced under the Guidelines's residual clause because Welch's *Johnson* claim arises in the ACCA context. Although in *Welch* the government agrees that *Johnson* applies retroactively to ACCA cases on collateral review, it specifically argues that *Welch* "does not present any issue" concerning *Johnson*'s retroactive application to Guidelines cases on collateral review. *Welch v. United States*, No. 15-6418, U.S. Brief at 38 n.9 (U.S. Feb. 9, 2016). And, in its *Welch* brief, the government notes that it has argued to lower courts "that *Johnson* is not entitled to retroactive effect" in Guidelines cases on collateral review because, in its estimation, "the Guidelines are part of the process for imposing sentence, rather than a set of substantive rules that alter the statutory boundaries of sentencing." *Id.* This position, however, is directly contrary to lower court decisions, which have consistently held that new rules narrowing the ACCA's residual clause apply retroactively in Guidelines cases.[3]

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[3] *See United States v. Doe*, 810 F.3d 132, 154 & n.13 (3d Cir. 2015) (holding that *Begay v. United States*, 553 U.S. 137 (2008), applies retroactively in Guidelines cases); *Narvaez v. United States*, 674 F.3d 621, 625-26 (7th Cir. 2011) (holding that because *Begay* and *Chambers v. United States*, 555 U.S. 122 (2009), announced

It is also directly contrary to the government's own, pre-*Johnson* position in litigation across the country regarding the retroactive application of this Court's ACCA residual clause decisions to Guidelines cases. For example, according to the Appellate Section of the Department of Justice just two years ago, this Court's decision in *Begay* "applies retroactively to ACCA cases, mandatory guidelines cases, and advisory guidelines cases alike." Supplemental Brief for United States on Rehearing En Banc at 48, *Spencer v. United States*, 773 F.3d 1132 (11th Cir. 2014) (*en banc*) (No. 10-10676). Then, the government emphasized that "*Begay*'s status as a substantive rule is fixed," and "does not fluctuate based on whether the prisoner is challenging an ACCA enhancement, a mandatory guidelines enhancement, or, as here, an advisory guidelines enhancement." *Id.* at 15. At that time, the government was "not aware of any such chameleon-like rules" that "were substantive for some purposes and procedural for others." *Id.* at 15. Rather, in the government's pre-*Johnson* estimation, "a rule either is or is not substantive." *Id.*

As a result of the government's newfound position on retroactivity, even if the Court holds in *Welch* that *Johnson* applies retroactively in ACCA cases, there will likely be divergent lower court decisions as to *Welch*'s implications in Guidelines cases.

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substantive rules, those rules apply retroactively in Guidelines cases); *Brown v. Caraway*, 719 F.3d 583, 594–95 (7th Cir. 2013) (same); *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1189 (9th Cir. 2011) (holding that because its decision limiting the definition of burglary under the ACCA was substantive, it applies retroactively in Guidelines cases); *Rozier v. United States*, 701 F.3d 681 (11th Cir. 2012) ("The government concedes, and we take it as a given, that the Supreme Court's" decision interpreting the ACCA's elements clause "is retroactively applicable" in Guidelines cases.).

In the ACCA context, the courts of appeals divided on whether *Johnson* applied retroactively to both initial and successive § 2255 motions, notwithstanding the government's concession that it did. There is little reason to anticipate greater uniformity in the Guidelines context, where the government opposes retroactivity. And once those the likely divisions among the lower courts occur, the retroactivity question will eventually make its way to this Court. But – absent prompt intervention – it will not arrive until after the statute of limitations has run on June 26, 2016. In the meantime, that issue would be litigated in thousands of cases, likely resulting in confusion in the lower courts, and thousands of federal prisoners left in legal limbo.

Delaying a decision on this critical issue would be particularly troubling given the heightened stakes. If those sentenced under the Guidelines's residual clause are eligible for *Johnson* relief, then many would be entitled to significant relief, including potential release. Those prisoners should not be forced to sit idle through another round of protracted litigation merely to learn whether their *Johnson* claim will be considered on the merits. And federal courts should not be burdened with litigation of the retroactivity question in thousands of cases where this Court could resolve that question once and for all prior to the June 26th deadline, obviating the need to tax the judiciary's scarce resources.

Of course, the one-year statute of limitations does not create an insurmountable obstacle for those federal prisoners who have never filed a § 2255 motion. Those prisoners may file an initial § 2255 motion raising a *Johnson*-based claim before June 26, 2016 and benefit from any subsequent ruling by this Court on retroactivity.

However, those federal prisoners who have filed a previous § 2255 motion may well be precluded from obtaining *Johnson* relief absent a prompt retroactivity decision from this Court. Those in a successive posture must first obtain authorization from the court of appeals before filing a § 2255 motion in the district court, and yet they cannot receive such authorization in the absence of a holding by this Court on the retroactivity question. *See* 28 U.S.C. § 2255(h)(2); *Tyler v. Cain*, 533 U.S. 656 (2001).

Accordingly, if the Court in *Welch* rules that *Johnson* applies retroactively in Guidelines cases, but does so *after* the limitations period elapses on June 26, 2016, any authorization from the court of appeals to file a successive § 2255 motion based on that decision will likely be for naught, because the motion will be deemed untimely. This quandary creates a substantial risk that, unless the Court decides this Term whether *Johnson* applies retroactively not only in the ACCA context, but also in the context of the Sentencing Guidelines, countless federal prisoners in the successive posture who seek to challenge the enhancement of their sentence under the Guidelines's residual clause may be left with no recourse except an original habeas petition filed in this Court. That would place a substantial burden on this Court's limited resources.

B. Whether *Johnson* applies retroactively to Guidelines cases is a question of great public importance.

The judicial efficiency concerns discussed above are particularly acute given the number of prisoners sentenced under § 4B1.2(a)(2)'s residual clause, which dwarfs the total number of prisoners sentenced under the ACCA. It is estimated that only 6,000

prisoners in total have been sentenced under the ACCA. *See* Leah M. Litman, *Residual Impact: Resentencing Implications of Johnson's Potential Ruling on ACCA's Constitutionality*, 115 COLUM. L. REV. Sidebar 55, 56 (2015). However, for each year from 1996 to 2011, the number of federal prisoners sentenced as career offenders under § 4B.1.1 ranged from a low of 909 to a high of 2,294, with that number exceeding 2,000 every year since 2006. U.S. Sentencing Comm'n, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing*, pt. C: Career Offenders, at 9 (Dec. 2012). Importantly, these figures do not include the many other federal prisoners who, while not career offenders, were nonetheless sentenced under § 4B1.2(a)(2)'s residual clause, since that clause is incorporated throughout the Guidelines. *See, e.g.*, U.S.S.G. §§ 2K1.3 & cmt. n.2 (explosive materials); 2K2.1 & cmt. n.1 (firearms); 2S1.1 & cmt. n.1 (money laundering); 4A1.1(e) & 4A1.2(p) (criminal history); 5K2.17 & cmt. n.1 (departure for semi-automatic firearms); 7B1.1(a)(1) & cmt. n.2 (probation and supervised release). Thus, the question of whether *Johnson* applies retroactively in Guidelines cases has the potential to affect thousands of federal prisoners who were sentenced under § 4B1.2(a)(2)'s residual clause.

Finally, persons sentenced as career offenders under the Guidelines's residual clause are serving lengthy sentences. *See* 28 U.S.C. § 994(h) (directing the Commission to "assure that the guidelines" for career offenders "specify a sentence to a term of imprisonment at or near the maximum authorized"); U.S.S.G. § 4B1.1 & cmt. n.3 (noting that career offender guideline implements Congress's directive set forth in

§ 994(h)). Mr. Beckles's career-offender designation increased his guideline range by 15 years to life. If *Johnson* applies retroactively to those, like Mr. Beckles, who are sentenced under § 4B1.2(a)(2)'s residual clause, thousands of federal prisoners may be entitled to significant relief.

C. This petition presents an ideal vehicle for the Court to decide whether *Johnson* applies retroactively to all Guidelines cases.

Travis Beckles's petition presents an ideal vehicle for the Court to decide whether *Johnson* applies retroactively to all Guidelines cases. As *Welch* will do for federal prisoners sentenced under the ACCA, this Court's resolution of the retroactivity question in the context of Mr. Beckles's first § 2255 motion will also "make" *Johnson* retroactive (or not) under § 2255(h)(2), and thus also conclusively resolve the retroactivity issue for those federal prisoners raising *Johnson*-based challenges to Guidelines sentences who are litigating second or successive motions.

Moreover, other petitions presenting the question of whether *Johnson* applies retroactively to Guidelines cases are unlikely to be filed this Term because the lower courts are staying both ACCA and Guidelines cases pending the decision in *Welch*. Petitioner is aware of only two other cases, one pending in this Court and one forthcoming, that also present the issue of *Johnson*'s retroactive application in Guidelines cases: *In re Gilberto Rivero*, No. 15-7776 (U.S. filed January 14, 2016), an original habeas matter in which the Court has ordered a response from the United

States that is currently due on April 1, 2016; and *United States v. Alfrederick Jones*, No. 14-2882 (3d Cir. reh'g denied Jan. 22, 2016), a forthcoming petition for writ of certiorari from the Third Circuit's denial of a certificate of appealability. Mr. Beckles urges the Court to accept review in *Rivero* or *Jones* and decide this important issue this Term if it does not do so here.

II. Whether *Johnson*'s constitutional holding applies to U.S.S.G. § 4B1.2(a)(2)'s residual clause – that is, whether *Johnson* claims are cognizable in Guidelines cases – presents an important question warranting this Court's prompt intervention.

A. The reasons compelling resolution of the retroactivity question this Term equally compel resolution of the cognizability question this Term.

To be eligible for collateral relief, prisoners whose sentences were enhanced under § 4B1.2(a)(2)'s residual clause not only need *Johnson* to apply retroactively, but also need their *Johnson*-based challenge to be "cognizable" in a collateral proceeding. The question of cognizability in the Guidelines context ultimately turns on whether *Johnson*'s constitutional holding applies to § 4B1.2(a)(2)'s residual clause. If so, the prisoners would have a constitutional, and thus cognizable, claim under § 2255(a). *See Hill v. United States*, 368 U.S. 424, 426-28 (1962). But if not, then not. *See Spencer v. United States*, 773 F.3d 1132 (11th Cir. 2014) (*en banc*) (holding that nonconstitutional Guideline errors are not cognizable on collateral review because they

do not amount to a miscarriage of justice). Because retroactivity and cognizability both serve as independent prerequisites to collateral relief, this Court should consider both questions together.

Moreover, all of the considerations above explaining why resolution of the retroactivity question is necessary this Term also apply to the cognizability question. If the Court affirmatively resolves the cognizability question in a subsequent Term, then those prisoners in the successive posture will be forced to file original habeas petitions in order to benefit from that ruling given the statute of limitations. And if the Court negatively resolves that question in a subsequent Term, then lower courts would needlessly be inundated with an avalanche of pro se litigation in the interim.

B. The circuits are divided on whether *Johnson* applies to the Guidelines's residual clause.

Whether *Johnson* applies to the Guidelines's residual clause has already generated a split in the circuit courts. In *United States v. Matchett*, 802 F.3d 1185, 1193-96 (11th Cir. 2015), the Eleventh Circuit rejected the government's concession that *Johnson* applied to the residual clause in § 4B1.2(a)(2), holding instead that the advisory Guidelines were not susceptible to a vagueness challenge. That ruling stands alone among the circuits.

The Tenth Circuit has rejected *Matchett* as unpersuasive and squarely held that, in light of *Johnson*, "the residual clause of § 4B1.2(a)(2) is void for vagueness." *United States v. Madrid*, 805 F.3d 1204, 1210-11 (10th Cir. 2015). The Third Circuit has done

the same. *United States v. Townsend*, ___ Fed. Appx. ___, 2015 WL 9311394, at *4 & n.14 (3d Cir. Dec. 23, 2015). In addition, the First, Second, Sixth, and Eighth Circuits have all either concluded that *Johnson* applies to the Guidelines, or vacated and remanded for resentencing in light of the government's concession that it does. *See, e.g., United States v. Soto-Rivera*, 811 F.3d 53, 58 (1st Cir. 2016); *United States v. Maldonado*, ___ Fed. Appx. ___, 2016 WL 229833 (2d Cir. 2016); *United States v. Taylor*, 803 F.3d 931, 933 (8th Cir. 2015); *United States v. Grayer*, 625 Fed. Appx. 313, 315 (6th Cir. 2015).

Although *Matchett* and the cases that stand in conflict with it were all decided on direct appeal, they bear directly on the cognizability question at issue here. If *Matchett* is left undisturbed, then hundreds if not thousands of federal prisoners in the Eleventh Circuit will be categorically barred from seeking relief based on *Johnson*, whether on direct appeal or in collateral proceedings.

In light of the circuit split, geography alone determines a prisoner's ability to seek relief under *Johnson*. For example, had Mr. *Beckles* been sentenced in the Tenth Circuit, his *Johnson* claim would be cognizable on collateral review. In the Eleventh Circuit, however, it is not. This Court's immediate intervention is necessary to ensure uniformity on this important question of law.

C. The Eleventh Circuit's anomalous decision is clearly wrong.

Further compelling review is that *Matchett* was wrongly decided. In appellate courts around the country, the government has affirmatively set forth its well-

considered national position "that *Johnson*'s constitutional holding regarding the ACCA's residual clause applies to the identically worded clause of the career offender guideline." *United States v. Madrid*, U.S. Brief, 2015 WL 4985890, *3 (10th Cir. August 2015) (No. 14-2159). After all, the two residual clauses are not only identically worded, but have always been interchangeably interpreted. *Id.* at *3-4 (citing cases). This Court itself did so in *Johnson*, relying on Guidelines cases to illustrate the vagueness of the ACCA's residual clause. *See* 135 S. Ct. at 2560 (citing Guidelines decisions in *United States v. Whitson*, 587 F.3d 1218 (11th Cir. 2010) (*per curiam*); *United States v. Williams*, 559 F.3d 1143 (10th Cir. 2009); *United States v. Carthorne*, 726 F.3d 503 (4th Cir. 2013); and *United States v. McDonald*, 592 F.3d 808 (7th Cir. 2010)).

Any doubt that *Johnson*'s constitutional holding applies to the Guidelines is eliminated by *Peugh v. United States*, 133 S. Ct. 2072 (2013), which held that the retrospective application of the advisory Guidelines violated the Ex Post Facto Clause. *Id.* at 2078. The Court emphasized that the Guidelines, while advisory, nonetheless remained the "lodestone" and "anchor" of the sentencing regime, and are subject to constitutional constraints. *Id.* at 2083-87. When read together, *Johnson* and *Peugh* compel the conclusion that *Johnson* applies to the Guidelines.

In reaching the contrary conclusion, the Eleventh Circuit in *Matchett* inexplicably relied entirely on decisions from other circuits that pre-dated both *Peugh* and *Johnson*. *See Matchett*, 802 F.3d at 1194-96 (citing, *e.g.*, *United States v. Tichenor*,

683 F.3d 358 (7th Cir. 2012), *United States v. Smith*, 73 F.3d 1414 (6th Cir. 1996); and *United States v. Wivell*, 893 F.3d 156 (8th Cir. 1990)). Those decisions adopted a cramped view of the vagueness doctrine, limiting it to laws proscribing conduct. *See, e.g., Wivell*, 893 F.2d at 159-60. But *Johnson* made clear that the doctrine "appl[ies] not only to statutes defining elements of crimes, but also to statutes fixing sentences." 135 S. Ct. at 2557 *Matchett* also adopted those circuits' pre-*Peugh* reasoning that the Guidelines were not susceptible to vagueness challenges because they were "merely" the starting point, and that a "'sentencing judge's authority to exercise discretion distinguishes the Guidelines from criminal statutes in a significant and undeniable manner.'" *Matchett*, 802 F.3d at 1194 (quoting *Tichenor*, 683 F.3d at 365). That reasoning is fundamentally irreconcilable with *Peugh*.

Not only did *Matchett* embrace abrogated reasoning, but it did not even attempt to follow *Peugh* and *Johnson*. *Matchett* cited *Peugh* only once and stated that it "in no way inform[ed]" its analysis. *Id.* at 1195. And, as the Tenth Circuit noted when it declined to follow *Matchett*, the Eleventh Circuit mischaracterized *Johnson* as being grounded exclusively in notice concerns, thereby failing to "address the 'arbitrary enforcement by judges' with which *Johnson* was concerned." *Madrid*, 805 F.3d at 1212 n.10.

Tellingly, the very courts that issued the pre-*Peugh* decisions on which *Matchett* relied are not following those decisions. The Sixth and Eighth Circuits have granted relief post-*Johnson* to those sentenced under § 4B1.2(a)(2)'s residual clause,

notwithstanding their prior precedents holding that the Guidelines are not susceptible to a vagueness challenge. *See, e.g.*, *Taylor*, 803 F.3d at 933-34 (Colloton, J., dissenting) (criticizing majority for declining to follow circuit precedent without convening *en banc* to overrule it); *United States v. Grayer*, 625 Fed. Appx. at 315. Indeed, since *Johnson*, the Eighth Circuit has stated that "[t]he reasoning in *Wivell* that the guidelines cannot be unconstitutionally vague because they do not proscribe conduct is doubtful." *Taylor*, 803 F.3d at 933. In short, *Matchett* flouts this Court's decisions in both *Johnson* and *Peugh*, and relies on out-of-circuit precedent that is no longer followed by those circuits post-*Johnson*. It is unpersuasive on its face, and this Court should not permit it to stand.

Moreover, this split is intractable. A petition for rehearing *en banc* was filed in *Matchett* on October 13, 2015, but has languished before the Eleventh Circuit. Nonetheless, that court has treated it as a final decision, issuing at least six decisions relying on or applying *Matchett* after the rehearing petition was filed, strongly indicating that rehearing will be denied.[4]

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[4] *United States v. Casamayor*, ___ Fed. Appx. ___, 2016 WL 722892 (11th Cir. Feb. 24, 2016); *United States v. Kirk*, ___ Fed. Appx. ___, 2016 335937 at *1 (11th Cir. Jan. 28, 2016); *United States v. Brown*, ___ Fed. Appx. ___, 2015 WL 9301410 (11th Cir. Dec. 22, 2015); *United States v. Collins*, 624 Fed. Appx. 725, 726 (11th Cir. 2015); *United States v. Dixon*, 622 Fed. Appx. 892 (11th Cir. 2015); *United States v. Walker*, ___ Fed. Appx. ___, 2015 WL 7074646, at *2-3 (11th Cir. 2015); *Denson v. United States*, 804 F.3d 1339, 1343 (11th Cir. 2015), *cert. denied*, ___ S. Ct. ___, 2016 WL 763612 (Feb. 26, 2016).

D. This petition squarely presents the cognizability issue.

Not only does this petition squarely present the retroactivity question; it also squarely presents the cognizability question. Mr. Beckles's eligibility for relief hinges on his challenge to his career offender enhancement being cognizable on collateral review.

Although the Eleventh Circuit did not mention *Matchett* in its decision on remand from this Court for reconsideration in light of *Johnson*, it nonetheless concluded that *Johnson* had no impact on Guidelines sentences, stating:

> The Supreme Court's decision in *Johnson* – in which the Supreme Court struck down, as unconstitutionally vague, the residual clause of the Armed Career Criminal Act ("ACCA") does not control this appeal. Beckles was sentenced as a career offender based not on the ACCA's residual clause, but based on express language in the Sentencing Guidelines classifying Beckles's offense as a "crime of violence." *Johnson* says and decided nothing about career-offender enhancements under the Sentencing Guidelines or about the Guidelines commentary underlying Beckles's status as a career-offender.

Beckles v. United States, 616 Fed. Appx. 415, 416 (11th Cir. 2015); A-1 at 3. Thus, the court below expresly limited *Johnson* to sentences imposed under the ACCA.

Moreover, the decision below is grounded in U.S.S.G. § 4B1.2(a)(2)'s residual clause. In rejecting Mr. Beckles's claim for relief under *Johnson*, the Eleventh Circuit explicitly relied on U.S.S.G. § 4B1.2's Application Note 1 to conclude that possession of a sawed-off shotgun constitutes a "crime of violence." Specifically, the Eleventh Circuit cited its earlier decision in *United States v. Hall*, 714 F.3d 1270 (11th Cir. 2013), to state "the Guidelines commentary in U.S.S.G. § 4B1.2 is binding and, thus,

possession of a sawed-off shotgun qualifies as a 'crime of violence.'" *Beckles*, 616 Fed. Appx. at 416 (citing *Hall*, 714 F.3d at 1274).

In its pre-*Johnson Hall* decision, the Eleventh Circuit stated the question before it was "whether an offense [i.e., possession of a sawed-off shotgun] qualifies as a 'crime of violence' *under the* [*Guidelines's*] *residual clause*," and held that it did. *Hall*, 714 F.3d at 1273 (emphasis added). Thus, on remand post-*Johnson* below, when the Eleventh Circuit rejected the notion that *Johnson* is controlling, it did no more than reaffirm *Hall*. *Beckles*, 616 Fed. Appx. at 416 ("Our decision in *Hall* remains good law and continues to control this appeal."); A-1 at 3. Accordingly, the Eleventh Circuit's decision here is grounded in the residual clause in § 4B1.2(a)(2), and expressly rejects *Johnson*'s application to the Guidelines's residual clause. *See id.*

This holding, along with the continuing viability of *Matchett* in the Eleventh Circuit, precludes Mr. Beckles from obtaining § 2255 relief on his *Johnson* claim even if the Court were to independently resolve the retroactivity question in his favor. Thus, this petition presents the cognizability question, and this Court should decide that question, along with the question of *Johnson*'s retroactive application to the Guidelines's residual clause, this Term in this case.

III. Whether possession of a sawed-off shotgun remains a "crime of violence" after *Johnson* because it is listed in the commentary to U.S.S.G. § 4B1.2 is an important question warranting this Court's resolution.

Not only are the circuits divided as to whether *Johnson*'s constitutional holding applies to the Guidelines; they also are divided as to whether the "unlawful possession of a firearm described in 26 U.S.C. § 5845(a)," which is listed as a "crime of violence" in the commentary to U.S.S.G. § 4B1.2, remains a "crime of violence" after *Johnson*. This division is the latest iteration of an longstanding split in the circuits as to whether the commentary to § 4B1.2, standing alone, has its own definitional power, or whether it is only valid and authoritative if it interprets and is not inconsistent with a guideline's text. The Court's intervention is therefore required.

A. The circuits are divided as to whether, post-*Johnson*, the "unlawful possession of a firearm described in 26 U.S.C. § 5845(a)" is a "crime of violence" for purposes of § 4B1.2 because it is expressly listed as such in the commentary to that Guideline.

Application Note 1 to § 4B.12 states that "'[c]rime of violence' does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun)." U.S.S.G. § 4B1.2 cmt. n.1. The referenced statute, § 5845(a), provides various definitions of the term "firearm," and, as the parenthetical

in Application Note 1 indicates, explicitly includes sawed-off shotguns and machine guns. *See* 26 U.S.C. § 5845(a).

The Eleventh Circuit determined below post-*Johnson* that because Mr. Beckles was convicted of possession of a sawed-off shotgun, Application Note 1 to § 4B1.2 provided an independent basis for applying the career offender enhancement. *See Beckles*, 616 Fed. Appx. at 416; A-1 at 3 ("Beckles was sentenced as a career offender based not on the ACCA's residual clause, but based on express language in the Sentencing Guidelines classifying Beckles's offense as a "crime of violence." *Johnson* says and decided nothing about the Guidelines commentary underlying Beckles's status as a career-offender."). The First Circuit, however, has expresaly disagreed, holding that post-*Johnson*, the commentary in Application Note 1 provides no basis for concluding that possession of a firearm falls within § 4B1.2's definition of "crime of violence." *United States v. Soto-Rivera*, 811 F.3d 53, 61 (1st Cir. 2016).

In *Soto-Rivera*, the defendant was convicted of possession of a machine gun, which, like a sawed-off shotgun, is a "firearm" described in 26 U.S.C. § 5845(a), and therefore listed as a "crime of violence" in Application Note 1 to § 4B1.2. *Id.* at 59. The First Circuit – unlike the Eleventh Circuit in *Matchett* – accepted the government's "concession that *Johnson*'s reasoning applies just as well to the Guidelines as to the ACCA" and, with the understanding that "Soto-Rivera's Career Offender status may not be predi ted upon the Guidelines's residual clause," determined that "in the absence of the residual clause, there is no textual hook in Guidelines § 4B1.2 to allow

for the conclusion that [Soto-Rivera's] possession of a firearm constituted a crime of violence." *Id.* at 59, 61.

In reaching its conclusion, the First Circuit noted that, under *Stinson v. United States*, 508 U.S. 36 (1993), "commentary 'interpret[ing] or explain[ing] a [G]uideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that [G]uideline.'" *Soto-Rivera*, 811 F.3d at 59 (quoting *Stinson*, 508 U.S. at 38) (brackets added in *Soto-Rivera*). That court therefore looked at the text § 4B1.2(a) stripped of its residual clause, and concluded that Application Note 1 was inconsistent with the guideline's remaining text. *Id.* at 60. First, the First Circuit determined, passive possession of a firearm – even a potentially dangerous one like a machine gun – did not qualify as a crime of violence under § 4B1.2(a)(1), because it did not have as an element the use, attempted use, or threatened use of physical force against the person of another. *See id.* (citing § 4B1.2(a)(1)). Next, it noted that "such possession is clearly not one of those specifically-enumerated crimes listed in U.S.S.G. § 4B1.2(a)(2)," *id.* – that is, it is not "burglary of a dwelling, arson, extortion, [or] involve[] use of explosives," § 4B1.2(a)(2).

Finally, the First Circuit rejected the argument that Application Note 1 was an independent basis for finding career offender status, noting that:

> doing so would be inconsistent with the post-*Johnson* text of the Guideline itself. By its clear language, once shorn of the residual clause, § 4B1.2(A) sets forth a limited universe of specific offenses that qualify as a "crime of violence." There is simply no mechanism or textual hook in the Guideline that allows us to import offenses not specifically listed therein into § 4B1.2(a)'s definition of "crime of violence." With no such

> path available to us, doing so would be inconsistent with the text of the Guideline. Accordingly, we reject the government's attempt to make use of § 4B.12(a)'s Application Note 1 to expand upon the list of offenses that qualify for Career Offender status.

Id.

No other circuit has considered whether possession of a firearm continues to qualify as a "crime of violence" due to Application Note 1 after *Johnson*. However, pre-*Johnson* decisions in the Fourth, Fifth, and Sixth Circuits expressly linked the question of whether possession of a sawed-off shotgun constituted a "crime of violence" to the residual clause. *See United States v. Hood*, 628 F.3d 669, 671 (4th Cir. 2010) ("Because § 4B1.2(a) does not expressly enumerate felony possession of a sawed-off shotgun, it constitutes a 'crime of violence' only if it falls under the 'residual' or 'otherwise' clause in § 4B1.2(a)(2)."); *United States v. Lipscomb*, 619 F.3d 474, 477 & n.3 (5th Cir. 2010) (holding possession of a sawed-off shotgun qualifies as a "crime of violence" only if it satisfies the residual clause); *United States v. Hawkins*, 554 F.3d 615, 618 (6th Cir. 2009) (holding Sentencing Commission's interpretation of the residual clause allowing possession of a sawed-off shotgun to qualify as a "crime of violence" was not clearly erroneous).

Therefore if, as the government concedes and the majority of circuits have concluded, *Johnson* applies to the Guidelines and excises the residual clause from § 4B1.2(a)(2), the only conclusion the Fourth, Fifth, and Sixth Circuits could reach is that possession of a sawed-off shotgun no longer qualifies as a "crime of violence" post-*Johnson*. They would therefore join the First Circuit in rejecting the Eleventh Circuit's

decision below that possession of a sawed-off shotgun remains a "crime of violence" after *Johnson*.

B. There is a longstanding division in the circuits as to whether the commentary to U.S.S.G. § 4B1.2 has freestanding definitional power, or whether offenses listed as "crimes of violence" in the commentary must instead satisfy one of the definitions in the guideline's text.

The post-*Johnson* split in the circuits as to whether possession of certain firearms constitutes a "crime of violence" under the commentary in Application Note 1 to § 4B1.2 is part of a larger, long-standing split in the circuit courts regarding the analysis to be used when relying on the Guidelines commentary to determine whether an offense is a "crime of violence."

Like the Eleventh Circuit below and in *Hall*, the Third and Seventh Circuits have found the Guidelines commentary to have freestanding definitional power; that is, the power to define "crimes of violence" regardless of whether those offenses satisfy the definitions found in the text of § 4B1.2(a)(1) or (a)(2). *See, e.g., United States v. Marrero*, 743 F.3d 389 (3d Cir. 2014) (holding Pennsylvania third-degree murder is a "crime of violence" under § 4B1.2 because "murder" is listed in the commentary and thus "enumerated" equally with those offenses listed in the text of the guideline; court never examines whether the offense satisfies either the force clause in § 4B1.2(a)(1) or the residual clause in § 4B1.2(a)(2), and distinguishes residual clause cases from

commentary cases); *United States v. Raupp*, 617 F.3d 756, 759-60 (7th Cir. 2012) (holding application notes are authoritative where they address a question uncontradicted by the text); *id.* at 762 (Wood, J., dissenting) (noting the conspiracy offense at issue does not satisfy § 4B1.2(a)(1)'s force clause and is not enumerated in § 4B1.2(a)(2) and therefore cannot be a "crime of violence" unless it satisfies the residual clause in § 4B1.2(a)(2), but majority "has concluded that it does not need to address" whether the offense qualifies under the residual clause because "it plays the trump card" of the commentary).

In sharp contrast, the First, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits, have instead concluded that offenses listed in Application Note 1 qualify as a "crime of violence" only if they satisfy one of the definitions in § 4B1.2's text. *See, e.g., Soto-Rivera*, 811 F.3d at 59-61; *United States v. Armijo*, 651 F.3d 1226, 1235 (10th Cir. 2011) (rejecting government's argument that inclusion in the commentary was sufficient to qualify manslaughter offense as a "crime of violence" where the offense failed to satisfy either the force clause in § 4B1.2(a)(1) or residual clause in § 4B1.2(a)(2)); *Hood*, 628 F.3d at 671; *Lipscomb*, 619 F.3d at 477 & n.3; *Hawkins*, 554 F.3d at 618; *United States v. Williams*, 110 F.3d 50, 52 (9th Cir. 1997) (finding kidnapping offense did not satisfy force clause in § 4B1.2(a)(1) and court "must therefore determine whether" it satisfied residual clause).

After this Court's decision in *Johnson*, and the government's concession that *Johnson* applies to the Guidelines's residual clause, this underlying split as to whether

the Guidelines commentary has freestanding definitional power is thrown into sharp relief, and requires this Court's intervention.

C. This case squarely presents whether possession of a sawed-off shotgun remains a "crime of violence" after *Johnson*.

Mr. Beckles's petition provides an ideal vehicle for the Court to determine whether possession of a sawed-off shotgun qualifies as a "crime of violence" under U.S.S.G. § 4B1.2(a)(2) after *Johnson*. First, the issue is squarely presented. Possession of a sawed-off shotgun was Mr. Beckles's instant offense of conviction. If, as the Eleventh Circuit concluded, possession of a sawed-off shotgun is a "crime of violence" under the Guidelines, his career offender enhancement remains. *See* § 4B1.1(a). If, on the other hand, this Court agrees with the First Circuit in *Soto-Rivera* that it is not a "crime of violence," Mr. Beckles was improperly sentenced as a career offender. By accepting review of Mr. Beckles's case, this Court can definitively answer whether possession of a sawed-off shotgun is a "crime of violence," and, at the same time, provide guidance to the lower courts considering other offenses listed as a "crime of violence" in the Guidelines commentary by addressing the larger split in the circuits as to whether the commentary has freestanding definitional power.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit. Should the Court issue a writ, Petitioner also prays for expedited briefing and argument in this matter this Term; or, in the alternative, that the Court expeditiously issue a *per curiam* opinion resolving the questions presented herein after the Court decides *Welch v. United States*, No. 15-6418.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: _____
Janice L. Bergmann
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
March 9, 2016

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APPENDIX

APPENDIX

Eleventh Circuit Opinion On Remand Reaffirming Denial of 28 U.S.C. § 2255 Motion, *Travis Beckles v. United States*, No. 13-13569 (11th Cir. September 29, 2015) A-1

Eleventh Circuit Order Denying Petition for Rehearing *En Banc*, *Travis Beckles v. United States*, No. 13-13569 (11th Cir. February 11, 2016) ... A-2

Supreme Court Order Granting Petition for Writ of Certiorari, Vacating and Remanding for Reconsideration in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), *Travis Beckles v. United States*, 135 S. Ct. 2928 (2015) A-3

Eleventh Circuit Opinion Affirming Denial of 28 U.S.C. § 2255 Motion, *Travis Beckles v. United States*, No. 13-13569 (11th Cir. Sept. 5, 2014) .. A-4

District Court Order Granting Government's Motion for Reconsideration and Denying 28 U.S.C. § 2255 Motion, *Travis Beckles v. United States*, No. 10-cv-23517 (S.D. Fla. June 14, 2013) A-5

District Court Order Granting 28 U.S.C. § 2255 Motion, *Travis Beckles v. United States*, No. 10-cv-23517 (S.D. Fla. Mar. 4, 2013) A-6

Report of Magistrate Judge Recommending Denial of 28 U.S.C. § 2255 Motion, *Travis Beckles v. United States*, No. 10-cv-23517 (S.D. Fla. Dec. 17, 2012) A-7

Eleventh Circuit Opinion on Direct Appeal, *United States v. Travis Beckles*, 565 F.3d 832 (11th Cir. 2009) A-8

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-13569
Non-Argument Calendar

D.C. Docket Nos. 1:10-cv-23517-CMA,
1:07-cr-20305-CMA-1

TRAVIS BECKLES,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(September 29, 2015)

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before WILSON, ANDERSON, and EDMONDSON, Circuit Judges.

PER CURIAM:

In this appeal, Travis Beckles challenged the district court's denial of his counseled 28 U.S.C. § 2255 motion to vacate his sentence. See Beckles v. United States, 579 F. App'x 833 (11th Cir. 2014) (unpublished). Beckles argued that he was sentenced improperly as a career offender under U.S.S.G. § 4B1.1; he contends his conviction for unlawful possession of a sawed-off shotgun was no "crime of violence." Id. We affirmed the district court's ruling, concluding that Beckles's argument was foreclosed by our decision in United States v. Hall, 714 F.3d 1270 (11th Cir. 2013). Id. The Supreme Court has now vacated our decision and remanded the case to us for additional consideration in the light of Johnson v. United States, 135 S.Ct. 2551 (2015). After additional review, we affirm.

Beckles was sentenced properly as a career offender under U.S.S.G. § 4B1.1. Beckles had at least two prior felony convictions for drug offenses. And Beckles's offense of conviction -- unlawful possession of a sawed-off shotgun -- constitutes a "crime of violence" under section 4B1.1. See U.S.S.G. § 4B1.2 cmt. n.1 (providing expressly that the unlawful possession of "a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence.'"); Hall, 714 F.3d at 1274 (concluding that

the Guidelines commentary in U.S.S.G. § 4B1.2 is binding and, thus, that the possession of a sawed-off shotgun qualifies as a "crime of violence").

The Supreme Court's decision in Johnson -- in which the Supreme Court struck down, as unconstitutionally vague, the residual clause of the Armed Career Criminal Act ("ACCA") -- does not control this appeal. Beckles was sentenced as a career offender based not on the ACCA's residual clause, but based on express language in the Sentencing Guidelines classifying Beckles's offense as a "crime of violence." Johnson says and decided nothing about career-offender enhancements under the Sentencing Guidelines or about the Guidelines commentary underlying Beckles's status as a career-offender.

Our decision in Hall remains good law and continues to control in this appeal. See Atl. Sounding Co., Inc. v. Townsend, 496 F.3d 1282, 1284 (11th Cir. 2007) ("Under our prior panel precedent rule, a later panel may depart from an earlier panel's decision only when the intervening Supreme Court decision is 'clearly on point.'"). Accordingly, we affirm.

AFFIRMED.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-13569-BB

TRAVIS BECKLES,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON SUPREME COURT REMAND

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42

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Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

June 30, 2015

Clerk
United States Court of Appeals for the Eleventh
Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: Travis Beckles
v. United States
No. 14-7390
(Your No. 13-13569)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of Johnson v. United States, 576 U. S. ___ (2015). Justice Kagan took no part in the consideration or decision of this motion and this petition.

Justice Alito concurring in the decision to grant, vacate, and remand in this case: Following the recommendation of the Solicitor General, the Court has held the petition in this and many other cases pending the decision in Johnson v. United States, 576 U. S. ____ (2015). In holding these petitions and now in vacating and remanding the decisions below in these cases, the Court has not differentiated between cases in which the petitioners would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act of 1984, 18 U. S. C. Sec. 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Court of Appeals should understand that the Court's disposition of this petition does not reflect any view regarding petitioner's entitlement to relief.

The judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45. Should a petition for rehearing be filed timely, the judgment or mandate will be further stayed pending this Court's action on the petition for rehearing.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-13569
Non-Argument Calendar

D.C. Docket Nos. 1:10-cv-23517-CMA,
1:07-cr-20305-CMA-1

TRAVIS BECKLES,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(September 5, 2014)

Before WILSON, ANDERSON, and EDMONDSON, Circuit Judges.

PER CURIAM:

Travis Beckles, a federal prisoner serving a 216-month sentence for possessing a sawed-off shotgun as a convicted felon, appeals the denial of his counseled 28 U.S.C. § 2255 motion to vacate his sentence. In his § 2255 motion, Beckles claimed that he was improperly sentenced as a career offender under U.S.S.G. § 4B1.1 because his conviction for possession of a sawed-off shotgun was not a "crime of violence." The district court ultimately denied the claim, citing our decision in *United States v. Hall*, 714 F.3d 1270 (11th Cir. 2013).

On appeal, Beckles acknowledges that *Hall* forecloses his claim, but contends that the case was wrongly decided. For the following reasons, we affirm.

I.

In a § 2255 proceeding, we review questions of law *de novo*. *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004). We are bound by the opinion of a prior panel unless the Supreme Court or this Court sitting *en banc* overrules that opinion. *United States v. Lawson*, 686 F.3d 1317, 1319 (11th Cir. 2012).

Under § 4B1.1 of the Sentencing Guidelines, a defendant who is convicted of a felony crime of violence or a controlled substance offense, and who already had two prior such convictions, is subject to an enhanced sentence for being a

career offender. U.S.S.G. § 4B1.1(a). The term "crime of violence" includes "any offense under state law, punishable by imprisonment for a term exceeding one year, that . . . involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a).

The commentary to § 4B1.2(a) explicitly states that "[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (*e.g.*, a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence.'" U.S.S.G. § 4B1.2 cmt. n. 1. Commentary in the Sentencing Guidelines that interprets a guideline "is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 508 U.S. 36, 37, 113 S.Ct. 1913, 1915, 123 L.Ed.2d 598 (1993).

In *Begay v. United States*, 553 U.S. 137, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008), the Supreme Court concluded that an offense is a "violent felony" under the Armed Career Criminal Act ("ACCA") – which defines the term using language nearly identical to the definition of "crime of violence" under U.S.S.G. § 4B1.2(a) – only if it is "roughly similar, in kind as well as in degree of risk posed" to the ACCA's enumerated crimes of burglary of a dwelling, arson, extortion, or unlawful use of explosives. *See Begay*, 553 U.S. at 143, 128 S.Ct. at 1585. Applying *Begay*, in *United States v. McGill*, 618 F.3d 1273 (11th Cir. 2010), we

concluded that a prior conviction for mere possession of a sawed-off shotgun, is not a "violent felony" under the ACCA. *McGill*, 618 F.3d at 1277.

In *Hall*, we decided that possession of an unregistered sawed-off shotgun, as defined by 26 U.S.C. § 5861(d), qualifies as a "crime of violence" under § 4B1.2(a), based on the commentary to that guideline provision. *Hall*, 714 F.3d at 1273. We explained that the commentary was controlling over *Begay* and *McGill*, because the commentary did not violate the Constitution or a federal statute, and was not inconsistent with, or a plainly erroneous reading of, the guideline text. *Id.* at 1273–74.

Here, Beckles's claim fails on the merits under *Hall*, and we are bound by that decision.

AFFIRMED.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 10-23517-CIV-ALTONAGA/Simonton

TRAVIS BECKLES,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE came before the Court on the United States's Motion to Reconsider Based on Intervening Eleventh Circuit Decision ("Motion") [ECF No. 39], filed May 30, 3013. The relief sought is evident from the title of the Motion, and the parties are familiar with the decision the Government seeks reconsideration of (*see* Order of March 4, 2013 ("March 4 Order") [ECF No. 34]). In response to the Motion, Movant, Travis Beckles, acknowledges that the undersigned is bound by the Eleventh Circuit's recent decision in *United States v. Hall*, 714 F.3d 1270 (11th Cir. 2013), but "posits" that the Eleventh Circuit reached the "wrong conclusion" in *Hall*. (*See* Resp. 2 [ECF No. 41]). Movant asks the Court not to reconsider its March 4 Order, ignoring the binding effect of *Hall*. This, the undersigned will not do. Accordingly, it is

ORDERED AND ADJUDGED that the Motion to Reconsider **[ECF No. 39]** is **GRANTED**. The Order of March 4, 2013 and Final Judgment [ECF No. 35] are **SET ASIDE**. Movant's Section 2255 Motion [ECF No. 1] is **DENIED**. A certificate of appealability is granted, as the many legal memoranda filed demonstrate that "jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537

U.S. 322, 327 (2003) (citation omitted).

DONE AND ORDERED in Miami, Florida, this 14th day of June, 2013.

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-23517-CIV-ALTONAGA/Simonton

TRAVIS BECKLES,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE came before the Court on Magistrate Judge Andrea M. Simonton's Report and Recommendation on Motion to Vacate Pursuant to 28 U.S.C. § 2255 ("Report") [ECF No. 27], issued on December 17, 2012. On September 30, 2010, Movant, Travis Beckles ("Beckles" or "Movant"), by and through counsel, filed a Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 ("Motion" or "Section 2255 Motion") [ECF No. 1]. The Court referred the Motion to Magistrate Judge Stephen T. Brown on October 4, 2010. (*See* [ECF No. 5]). On January 28, 2011, the Court set aside the referral and administratively closed the case in light of the then-pending *en banc* hearing in *Gilbert v. United States*. (*See* Order dated Jan. 28, 2011 [ECF No. 10]). After the Eleventh Circuit issued its *en banc* decision, *see Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011), the case was reopened, and the Motion was referred to Magistrate Judge Simonton. (*See* Order dated June 22, 2011 [ECF No. 16]). Magistrate Judge Simonton received supplemental briefs on the Motion (*see* [ECF Nos. 19, 20]), and heard oral argument (*see* [ECF No. 26]).

The sole issue before Magistrate Judge Simonton was whether Beckles's challenge to the

determination of his sentencing guideline range is cognizable in a Section 2255 motion. (*See* Rep. 2). More specifically, the question was

> whether a defendant may obtain relief pursuant to 28 U.S.C. § 2255 where his advisory sentencing guideline range was incorrectly enhanced using the career offender guideline, he preserved the error for review on direct appeal, has timely filed his first Motion to Vacate pursuant to 28 U.S.C. § 2255, and there is a reasonable probability that he received a greater sentence than he would have received if his guideline range had been properly calculated; but the sentence imposed after giving him credit for providing substantial assistance to the government was below the unenhanced guideline range applicable to non-career offenders.

(*Id.* 3). After careful consideration, Judge Simonton recommends the Motion be denied, but that a certificate of appealability be issued. (*See id.* 36). Beckles timely filed Objections [ECF No. 28], to which the United States ("Government"), responded (*see* Resp. [ECF No. 33]). The Court has conducted a *de novo* review of the record and has carefully considered the Report, the parties' respective positions, and applicable law.

I. BACKGROUND

A jury convicted Beckles on August 2, 2007 of possession of a firearm by a convicted felon, in violation of 18 U.S.C. section 922(g). Following the trial, the Pre-Sentence Investigation Report ("PSI") prepared for the Court recommended that Beckles be sentenced as an armed career criminal pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e), which requires that a minimum sentence of 15 years (180 months) be imposed. The offense statutory maximum is a life sentence.

Pursuant to the Armed Career Criminal Act, the United States Sentencing Guidelines ("U.S.S.G." or "Sentencing Guidelines") provide:

> The offense level for an armed career criminal is the greatest of:
>
> (2) the offense level from §4B1.1 (Career Offender) if applicable; or
> (3) (A) 34, . . if the firearm possessed by the defendant was of a

type described in 26 U.S.C. § 5845(a)[1]

U.S.S.G. § 4B1.4(b) (2006) (emphasis in original). Under the Career Offender provision, an offense with a statutory maximum sentence of life is assigned an offense level of 37. (*See id.* § 4B1.1). A criminal history category of VI, which was assigned to Beckles, corresponds to the following sentencing guideline ranges: 262 to 327 months for an offense level of 34; 360 months to life for an offense level of 37. Ultimately, the PSI recommended that Beckles be sentenced as a career offender[2] as "he was at least 18 years old at the time of the instant offense, the instant offense is a felony crime of violence (unlawful possession of a sawed-off shotgun), and the defendant has at least two prior felony convictions of a controlled substance offense." (PSI 6).[3]

At the October 17, 2007 sentencing hearing, the Court observed:

> [T]he Defendant has 18 arrests that resulted in convictions and/or juvenile adjudications, and I note in the presentence report 12 additional arrests that did not result in convictions, and we have a defendant, Mr. Beckles, who is 24-years-old. That's a pretty extensive criminal history.
>
> When I look at the exhibits which have been introduced today, the certified copies of the prior convictions, what stands out is that the defendant was never appropriately punished for any of his prior felony convictions.

---

[1] There is no current dispute that Beckles possessed a firearm of a type described in 26 U.S.C. section 5845(a), namely, a sawed-off shotgun.

[2] A defendant is a career offender if

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction;
>
> (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and
>
> (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1 (indentation added). It is evident that Beckles's crime is not a controlled substance offense. It is also undisputed that Beckles does not challenge either the first or third requirement.

[3] An electronic version of the PSI is unavailable on the Court's CM/ECF Case Management System.

> I share in [A.U.S.A.] Mr. Koukios' sentiments that the failure of the State Criminal Justice System to adequately and appropriately have addressed the severity of your crimes is not a reflection upon what occurs here. It is a sad testament that you are going to be sentenced today to a term of imprisonment far in excess of anything you have ever remotely experienced, and [your attorney,] Mr. Spivak has time and time again in this case presented arguments on your behalf as to why I should not sentence you within the Guidelines, and Mr. Koukios has responded by referring the Court back to Congress' mandate as it pertains to career offenders such as yourself, and Congress has spoken and directed the Sentencing Commission that the Guideline for career offenders should specify a sentence to a term of imprisonment at or near the maximum term authorized — the maximum — and the maximum here, of course, is life.
>
> The Sentencing Commission also established certain minimum offense levels where the weapon possessed is a sawed-off shotgun, as it was here.
>
> I am not persuaded, notwithstanding that I agree with Mr. Spivak that you were not appropriately sentenced in the State Court, to depart from the advisory Guideline range here and to sentence you outside the Guidelines.

(Sentencing Tr. dated Oct. 17, 2007, at 40:23–41:3, 41:4–8, 42:7–43:3 [ECF No. 75 in Case No. 07-20305-CR]).

Following Beckles's unsuccessful direct appeal of his original sentence,[4] on April 7, 2010, the Government filed a Motion for Reduction of Sentence Pursuant to Federal Rule of Criminal Procedure 35(b) [ECF No. 33]. On June 22, 2010, the Court held a hearing and granted the Motion. (*See* Tr. for Hr'g dated June 22, 2010, at 8:7–8 [ECF No. 18 in Case No. 07-20305-CR]). The hearing focused on the extent of Beckles's cooperation with the Government, with no specific discussion of the crime for which Beckles was imprisoned. (*See generally id. passim*). Although the Government requested only a 20 percent sentencing reduction, the Court was persuaded that a 40 percent reduction was warranted. (*See id.* 8:8–9). Beckles's prison term was thereby reduced to 216 months. (*See* Order dated June 22, 2010 [ECF No. 150 in Case No. 07-

[4] *See United States v. Beckles*, 565 F.3d 832 (11th Cir. 2009) (affirming conviction and sentence); *Beckles v. United States*, 130 S. Ct. 272 (2009) (denying petition for writ of certiorari).

20305-CR]).

Beckles now challenges his sentence, asserting that his original sentence was improperly enhanced because unlawful possession of a sawed-off shotgun is not a crime of violence, and therefore, he is not a career offender. Beckles contends had he not been deemed a career offender, the appropriate sentencing guidelines would have yielded a sentencing range of 262 to 327 months; consistent with what the Court did at his sentencing hearing the Court would have sentenced Beckles to the low-end of the guidelines range;[5] and application of the Court's subsequent 40 percent reduction would have yielded a final sentence of 180 months, the statutory minimum sentence required for unlawful possession of a firearm by a felon. The Government opposes the relief sought in the Motion solely on the ground that Beckles's challenge is not cognizable under Section 2255. (*See* Rep. 2 & n.1 (declining to *sua sponte* address argument not properly raised in the parties' briefs); *see generally* Resp. (no objection to Judge Simonton's decision to decline to address issues not discussed in the papers)).

II. LEGAL STANDARD

When a magistrate judge's "disposition" has properly been objected to, district courts must review the disposition *de novo*. FED. R. CIV. P. 72(b)(3). When no party has timely objected, however, "the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." FED. R. CIV. P. 72 advisory committee's notes (citation omitted). Although Rule 72 itself is silent on the standard of review, the Supreme Court has acknowledged Congress's intent was to only require a *de novo* review where objections have been properly filed, not when neither party objects. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985) ("It does not appear that Congress intended to require district court review of a magistrate

[5] A forty percent reduction from even the high-end of the correct guidelines would have also yielded a lesser sentence of 196 months.

[judge]'s factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings."). In any event, the "[f]ailure to object to the magistrate [judge]'s factual findings after notice precludes a later attack on these findings." *Lewis v. Smith*, 855 F.2d 736, 738 (11th Cir. 1988) (citing *Nettles v. Wainwright*, 677 F.2d 404, 410 (5th Cir. 1982)).

III. DISCUSSION

Section 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground
>
> [(1)] that the sentence was imposed in violation of the Constitution or laws of the United States, or
>
> [(2)] that the court was without jurisdiction to impose such sentence, or
>
> [(3)] that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack,
>
> may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a) (emphasis added). Beckles's sentence clearly does not exceed the maximum authorized by law, which is life imprisonment. The Court's jurisdiction is also not at issue. Thus, what remains for the Court to determine is whether Beckles's cause falls under any of the remaining statutory grounds for relief; namely, whether the sentence: (1) was imposed in violation of the Constitution; (2) was imposed in violation of the laws of the United States; or (3) is otherwise subject to collateral attack. The Court reviews each possible ground for relief in turn.

A. Whether the Sentence Violates the Constitution

Although Beckles initially asserted that the sentence was imposed in violation of his constitutional due process rights (*see* Rep. 14 (citing Reply 2 [ECF No. 9]), he did not

specifically object to Judge Simonton's conclusion that such an argument was rejected by the Eleventh Circuit in *Gilbert*, 640 F.3d 1321–22 ("Gilbert's claim that a sentencing guidelines provision was misapplied to him is not a constitutional claim. If it were, every guidelines error would be a constitutional violation. However prescient the Founders may have been in other respects, they did not think to incorporate the sentencing guidelines into the Constitution or Bill of Rights. Nor is it plausible to suggest that every error adversely affecting a defendant's sentence violates the Due Process Clause."). Accordingly, *de novo* review of this issue is not warranted.

The undersigned has reviewed the Report, the Motion, the record, and the applicable law to assure herself that no clear error appears on the face of the record. In the light of that review, the undersigned agrees with the analysis and recommendations stated in Judge Simonton's Report that relief is unavailable under this prong of Section 2255.

B. Whether the Sentence Violates the Laws of the United States

It is well established that a claim raised under Section 2255 need not be of constitutional dimension to be cognizable. *See Davis v. United States*, 417 U.S. 333, 342–46 (1974); *id.* at 344 ("[T]here can be no doubt that the grounds for relief under § 2255 are equivalent to those encompassed by § 2254, the general federal habeas statute, under which relief is available on the ground that '(a person) is in custody in violation of the Constitution or laws or treaties of the United States.'" (alterations in original)). Nevertheless, not "every asserted error of law can be raised on a § 2255 motion." *Id.* at 346. Indeed, "'collateral relief is not available when all that is shown is a failure to comply with the formal requirements' of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error." *Id.* (quoting *Hill v. United States*, 368 U.S. 424, 429 (1962)). Rather, for a movant to obtain relief,

the claimed error of law should be "'a fundamental defect which inherently results in a complete miscarriage of justice,' and present[] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Id.* (quoting *Hill*, 368 U.S. at 428); *see also United States v. Addonizio*, 442 U.S. 178, 185 (1979).

What is encompassed by the term "laws of the United States" is disputed by the parties. As Justice Rehnquist once observed, "the term's longevity [since the Habeas Corpus Act of 1867] has not brought with it a corresponding judicial elucidation. Like many other issues in the field of habeas corpus, the question seems to have been left for decision on a case-by-case basis." *Davis*, 417 U.S. at 359 (Rehnquist, J., dissenting). In this case, the Report's careful review of Eleventh Circuit case law shows that the appellate court has not reached the cognizability issue presented here. *See, e.g., Gilbert*, 640 F.3d at 1306 (finding "no reason to decide" whether a guidelines misapplication claim may be brought in a collateral attack); *McKay v. United States*, 657 F.3d 1190, 1195 (11th Cir. 2011) ("Because we hold that McKay's sentencing claim is procedurally defaulted , we leave for another day the question of whether this type of claim is cognizable under § 2255 in the first instance."). Judge Simonton ultimately concludes that "sentencing guidelines are not 'laws' within the meaning of § 2255" (Rep. 15), and that therefore Beckles's sentence was not imposed in "violation of the laws of the United States." Although the Court recognizes that "errors in the implementation of the Sentencing Guidelines are generally not cognizable in a collateral attack," *Buggs v. United States*, 153 F.3d 439, 443 (7th Cir. 1998) (citations omitted), for the following reasons, the Court departs from Judge Simonton's recommendation.

a. Identifying the Alleged Error

As a threshold matter, the law that Beckles's sentence is alleged to violate must be

specifically identified. *See, e.g.*, *Davis*, 417 U.S. at 359–361 (teasing out the "law of the United States" at issue) (Rehnquist, J., dissenting). Beckles does not argue that the violated "law" is contained in the text of or commentary to a particular sentencing guideline. In other words, he does not contend that his offense level was incorrectly calculated because the text of the guidelines manual was not followed accurately according to the law as it was understood at the time. Indeed, the applicable guidelines manual specifically states: "Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun .) is a 'crime of violence,'" U.S.S.G. § 4B1.2, at 373 (defining terms used in U.S.S.G. § 4B1.1 and including "application notes" in commentary), and the PSI reflects the application of this note. (*See* PSI 6). Rather, throughout Beckles's legal memoranda, he reiterates the violated "law" is that established by *Begay v. United States*, 553 U.S. 137 (2008), *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008), and *United States v. McGill*, 618 F.3d 1273 (11th Cir. 2010) — which counsel that possession of a sawed-off shotgun is not a "crime of violence" within the meaning of U.S.S.G. section 4B1.1.[6]

The alleged error identified here is similar to the law that was violated in *Davis*, 417 U.S. 333. In that case, the petitioner, Joseph Anthony Davis ("Davis"), after having been ordered to report for a pre-induction physical examination by his draft board, failed to appear for the physical. After multiple attempts to communicate with Davis to schedule another date for the physical, the draft board declared him a "delinquent" pursuant to 32 C.F.R. section 1642.4(a)

[6] The Report summarizes the law of those cases as follows: "*Begay* narrowed the definition of what constituted a violent felony under the Armed Career Criminal Act ["ACCA"];" *Archer* held that the "definition of 'violent felony' for purposes of the Armed Career Criminal Act is 'virtually identical' to the definition of a crime of violence for purposes of the career offender guideline enhancement, and that the crime of carrying a concealed firearm is not a crime of violence" (Rep. 5–6); and the Eleventh Circuit concluded in *McGill* that possessing a "short-barreled shotgun was not a violent felony under the ACCA." *McGill*, 618 F.3d 1273, 1279 (11th Cir. 2010).

(1967). Davis was then ordered to report for induction into the Armed Forces despite not having completed a physical, as the draft board was permitted to do under 32 C.F.R. section 1631.7. Having failed to report for the induction hearing, Davis was prosecuted and convicted under 50 U.S.C. App. § 462(a). Following an unsuccessful appeal of his conviction on the merits, Davis filed a Section 2255 motion, asserting that an intervening change in the law rendered his confinement in violation of the laws of the United States. *See Davis*, 417 U.S. at 335–37, 340, 342–43. The Supreme Court agreed and held that relief under Section 2255 was available to Davis by reason of an intervening change in the law.

Specifically, the law at issue in *Davis* was the Ninth Circuit Court of Appeals panel decision in *United States v. Fox*, 454 F.2d 593 (9th Cir. 1971), which was published after Davis's initial sentencing. *See Davis*, 417 U.S. at 340–41; *id.* at 360 (Rehnquist, J., dissenting) (closely analyzing the majority's opinion). The *Fox* court had addressed nearly identical circumstances as those presented in *Davis*, and relied upon the principles outlined by the Supreme Court in *Gutknecht v. United States*, 396 U.S. 295 (1970), to conclude that an accelerated induction hearing brought about by a declaration of delinquency was, as a matter of law, punitive, and therefore unlawful. The *Davis* Court remanded the case because according to *Fox*, the act for which Davis was convicted and punished — failure to report for an accelerated induction — was no longer criminal because the induction hearing he failed to attend was unlawful.

Similarly, here, the judicial lawmaking of concern consists of Eleventh Circuit panel decisions, *Archer* and *McGill*, both of which issued after Beckles was first sentenced. These cases were premised on the Supreme Court decision in *Begay* — which was also issued after Beckles's initial sentencing — clarifying the definition of "violent felony" as the term is used in

the Armed Career Criminal Act. Directly following from these Eleventh Circuit decisions is the legal conclusion that possession of a sawed-off shotgun is not a "crime of violence" within the meaning of U.S.S.G. section 4B1.1. The Government does not contest this issue in its briefs. Just as the violated "law" at issue in *Davis* was *Fox* and *Gutknecht* (and not the federal regulation under which Davis's accelerated induction hearing was held), the violated "law" here is that expressed in *Begay*, *Archer*, and *McGill* (and not the Sentencing Guidelines that define "crime of violence").

Thus, the Court's inquiry does not hinge on whether the advisory Sentencing Guidelines are or are not "laws of the United States," and whether the misapplication of those Guidelines presents a cognizable Section 2255 claim. Instead, the issue is whether the violation of the principles of *Begay*, *Archer*, and *McGill*, laws unto themselves, presents a cognizable Section 2255 claim.

b. Whether the Error Was a Fundamental Defect Which Inherently Results in a Complete Miscarriage of Justice[7]

To determine whether a violation of the law of *Begay/Archer/McGill* is cognizable on a Section 2255 motion, the error must be "a fundamental defect which *inherently* results in a complete miscarriage of justice." *Davis*, 417 U.S. at 346 (quoting *Hill*, 368 U.S. at 428)

[7] The briefing and Report consistently refer to a "*fundamental* miscarriage of justice" standard. However, the analysis required in this case rests on a determination of whether a "*complete* miscarriage of justice" followed from a fundamental defect. *Davis*, 417 U.S. at 346 (quoting *Hill*, 368 U.S. at 428). The Court has no comment on whether the two standards are equivalent.

In any event, case law addressing whether a "fundamental miscarriage of justice" (a term often used interchangeably with "actual innocence" in such cases) exists to overcome a petitioner's procedural default of his claims, is unenlightening. No law has been presented to the Court to support the proposition that *Hill*'s "complete miscarriage of justice" standard is only met when a petitioner's actions for which he was convicted are later deemed lawful. Indeed, in *Addonizio*, 442 U.S. at 187, the grounds raised by petitioner to vacate his sentence rested on a subsequent change to parole policies, wholly unrelated to his underlying guilt. Yet, the Supreme Court did not reject the petitioner's claims for failing to show that he was not innocent; rather, the Court went through a lengthy, careful analysis of why his claim did not warrant Section 2255 relief. *See id.* 187–190.

(emphasis added). Such an error is one that "renders the entire proceeding irregular or invalid." *Addonizio*, 442 U.S. at 187. Typically, errors of this "fundamental" nature do not include "procedural" errors. *See, e.g.*, *Narvaez v. United States*, 674 F.3d 621, 627–28 n.11 (7th Cir. 2011) (examining five cases where the Supreme Court "addressed the issue of whether a non-constitutional, non-jurisdictional error is a miscarriage of justice" and observing that the Court found no miscarriage of justice in four cases that involved "errors of a procedural nature," but did find a miscarriage of justice in the sole case involving a "substantive error" (citations omitted)). After carefully reviewing applicable case law, Judge Simonton recommends that because Beckles's current sentence of 216 months "does not exceed the statutory maximum [of a life sentence]" and "could be reimposed even without the career offender enhancement," Beckles's sentence does not "constitute[] a miscarriage of justice." (Rep. 24). For the following reasons, the Court disagrees with this conclusion.

As a threshold matter, the Court clarifies that the violation of the law of *Begay/Archer/McGill* occurred at the initial sentencing hearing when the Court premised its initial sentence on Beckles's career offender status due to his possession of a sawed-off shotgun. (*See* Sentencing Tr. dated Oct. 17, 2007, at 42:17–24 ("Congress has spoken and directed the Sentencing Commission that the Guideline for career offenders should specify a sentence to a term of imprisonment at or near the maximum term authorized . . The Sentencing Commission also established certain minimum offense levels where the weapon possessed is a sawed-off shotgun, as it was here.")). This error *inherently* resulted in the application of an incorrect Guidelines range of 360 months to life (*see* Sentencing Tr. dated Oct. 17, 2007, at 40: 13–19), as opposed to a sentencing range of 262 to 327 months. Other unrelated circumstances that may have fortuitously ameliorated some of the consequences flowing from the error — such as

Beckles's substantial cooperation with the Government on an unrelated matter, and the Government's motion for a sentence reduction on that basis — do not affect the Court's present evaluation of the error and its inherent consequences. Indeed, the Government concedes, and the Court agrees, that regardless of Beckles's initial sentence, his cooperation with the Government in an unrelated murder case would have yielded the same 40% reduction in sentence. In short, the critical question is not whether Beckles's modified 216-month sentence is a complete miscarriage of justice, but whether his initial 360-month sentence is a complete miscarriage of justice.

Beckles was clearly prejudiced by the error as it resulted in a sentence disparity of 33 to 98 months. Nevertheless, the Government argues, however, that because the Sentencing Guidelines are now advisory as opposed to mandatory, the disparity is not "illegal" or "invalid"; rather, because the Court maintains discretion to sentence individuals within statutory limits, Beckles's initial sentence, even if issued under misguidance, remains lawful and is therefore not a "complete miscarriage of justice." The Report finds merit in this argument. (*See* Rep. 20–21 (citing *Gonzalez v. United States*, Nos. 8:11-cr-134-T-17EAJ, 8:11-cv-1474-T-17EAJ, 2012 WL 279451 (M.D. Fla. Jan. 31, 2012); *Harris v. United States*, No. 8:11-CV-T-30TBM, 2011 WL 5834749 (M.D. Fla. Nov. 21, 2011)). For the following reasons, the Court disagrees.

Although the Court enjoys broad discretion in sentencing determinations, that discretion is not unfettered. *See Mistretta v. United States*, 488 U.S. 361, 363–370 (1989) (laying out the history of discretionary sentencing in the federal criminal justice system through the 1984 Sentencing Reform Act ("SRA"), 18 U.S.C. § 3551 *et seq.*, which implemented mandatory sentencing guidelines); *United States v. Booker*, 543 U.S. 220, 259 (2005) (severing two provisions of the SRA, including "the provision that requires sentencing courts to impose a

sentence within the applicable Guidelines range []in the absence of circumstances that justify a departure[]"). The Court must still comply with the SRA, which

> requires judges to *consider the Guidelines sentencing range established for the applicable category of offense committed by the applicable category of defendant*, § 3553(a)(4)(A), the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims, §§ 3553(a)(1), (3), (5)-(7) (2000 ed. and Supp. IV). And the Act nonetheless requires judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care. § 3553(a)(2) (2000 ed. and Supp. IV).

Id. at 259-260 (emphasis added; internal quotation marks omitted). Sentences can be appealed and reviewed by appellate courts on "reasonableness" grounds. *Id.* at 261. Thus, although "the Guidelines are no longer mandatory, neither are they without force." *United States v. Wetherald*, 636 F.3d 1315, 1321 (11th Cir. 2011). Not only is consideration of the Guidelines required by statute, "[t]he simple reality of sentencing is that a 'sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines.'" *Id.* (quoting *Rita v. United States*, 551 U.S. 338, 351 (2007)). "This starting point serves to cabin the potential sentence that may be imposed." *Id.*

Because the Guidelines are "central to the sentencing process," *id.* at 1322, and have a binding effect, the Eleventh Circuit has held, for example, that the *Ex Post Facto* Clause is violated when a district judge applies the Sentencing Guidelines range in effect on the date of sentencing that is greater than the Guidelines range in effect on the date of the offense, if the decision results in a substantial risk of harsher punishment. *Id.* at 1322–23. *Wetherald* illustrates that although "ordinary" errors in the application of the Guidelines may not result in a complete miscarriage of justice, *Gonzalez*, 2012 WL 279451, at *5, certain application errors do.

That the error illustrated in *Wetherald* is one of constitutional dimension does not

preclude a finding that certain non-constitutional Guideline application errors can result in a miscarriage of justice. Indeed, *Hill*'s complete miscarriage of justice standard applies to non-constitutional errors; it would be circuitous and illogical to require a Guidelines application error to amount to a constitutional violation before the Court can deem the error results in a complete miscarriage of justice.

The error here — a violation of the law established in *Begay/Archer/McGill* — is no "ordinary" Guidelines application error. "*Begay* announced a new substantive rule of law." *Kendrick v. United States*, Case Nos. 5:08–cv–447–Oc–10GRJ, 5:03–cr–63–Oc–10GRJ2009, 2009 WL 2958976, at *2 (M.D. Fla. Sept. 15, 2009). Additionally, "*Archer* represents a clear and dramatic break from prior precedent involving an important substantive issue as distinguished from a procedural question or clarification of original intent." *Id.* The Court agrees with these opinions of Judge Terrell Hodges — what constitutes "crimes of violence" was substantively changed by *Begay*, *Archer*, and now, *McGill*. Significantly, the application note of the Guidelines, "[u]nlawfully possessing a [sawed-off shotgun] is a 'crime of violence,'" U.S.S.G. § 4B1.2 (application notes), is at odds with the legal principle set forth by *Begay/Archer/McGill*. The cases relied upon in the Report, *Harris*, 2011 WL 5834749, and *Gonzalez*, 2012 WL 279451, are less persuasive on this issue.[8]

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[8] The *Harris* court relied on *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004), and *Burke v. United States*, 152 F.3d 1329, 1331–32 (11th Cir. 1998), to support its conclusion that a challenge to a trial court's application of the Sentencing Guidelines was "a non-constitutional issue that provides no basis for collateral relief." *Harris*, 2011 WL 5834749, at *3. The citation to *Lynn*, however, merely explains that a Section 2255 motion "may not be a surrogate for a direct appeal," *Lynn*, 152 F.3d at 1232, which is not at issue here; and the issue presented in *Burke* — whether a post-conviction clarifying amendment to the Guidelines presented a cognizable non-constitutional issue — is distinguishable from the question raised by Beckles. As to *Gonzalez*, the court there reasoned in part that the Sentencing Guidelines application error at issue was "ordinary" because such an error could not be "inconsistent with the rudimentary demands of fair procedure" in a system of "unbounded sentencing discretion." *Gonzalez*, 2012 WL 279451, at *5 (citation omitted). For the reasons previously stated, *see supra* 13–14, the Court does not have "unbounded sentencing discretion" and therefore finds *Gonzalez* inapplicable.

The identified defect undermines the validity of Beckles's sentencing proceedings. At the sentencing hearing, the Court commented that it was a "sad testament" that Beckles was going to be sentenced to a term of imprisonment far in excess of anything he had previously experienced (Sentencing Tr. dated Oct. 17, 2007, at 42:10–12); because he received such lenient sentences for his prior state court convictions, the gravity of Beckles's state crimes was not impressed upon him through his punishments. The Court ultimately sentenced Beckles to the low-end of the Guidelines. (*See id.* 43:10–12). In declining to downward depart from the Guidelines, the undersigned emphasized that "[t]he Sentencing Commission established certain minimum offense levels where the weapon possessed is a sawed-off shotgun," a reference to the application note of U.S.S.G. section 4B1.2 and the PSI. (*See* PSI 6). The Court continued: "I am not persuaded, notwithstanding that I agree with [Beckles's counsel] that [Beckles was] not appropriately sentenced in the State Court, to depart from the advisory Guideline range here " (Sentencing Tr. dated Oct. 17, 2007, at 42:25–43:2). In sum, the record reflects (and is consistent with the undersigned's recollection) that but for the minimum offense levels assigned by the Sentencing Commission, the Court *would not have* imprisoned Beckles to 360 months, a term substantially greater than a sentence within a corrected range of 262 to 327 months. Thus, although the imposed 360-month sentence does not exceed the statutory maximum, such a sentence could only be re-imposed under the SRA if the Court had a separate reason that could justify departing upward from the corrected range. No such reasoning was expressed at the Sentencing Hearing — quite the contrary. As such, on this record, a 360-month sentence is invalid without the career offender enhancement because it involves a "clear error of judgment" by this sentencing court in weighing the Section 3553[9] factors. *See Wetherald*, 636 F.3d at 1322.

Beckles's case contrasts sharply with the circumstances in *Ayuso v. United States*, 361 F.

[9] 18 U.S.C. § 3553.

App'x 988 (11th Cir. 2010), where the court found the district court's proceedings lacked any fundamental defect. There, the petitioner argued that he was improperly assessed an additional one criminal history point because after sentencing he successfully moved the state court to vacate a prior petty larceny conviction (which supported the added criminal history point in the petitioner's sentencing calculations) in place of a *nolo contendere* plea. *See id.* at 989–90. At the time of the petitioner's sentencing, the district court correctly calculated the petitioner's criminal history points based on a then-accurate criminal history record. Moreover, petitioner's argument was meritless as a *nolo contendere* plea would not have altered the number of criminal history points assigned to him. *See id.* at 991. Thus, the petitioner failed to demonstrate both any defect in the district court's sentencing proceedings and any resultant prejudice.

The situation presented by Beckles is most similar to the circumstances presented in *Kendrick*. There, the petitioner, Kendrick, was convicted of possessing cocaine base or crack cocaine with intent to distribute it. At sentencing, he was classified as a "career offender" because of prior convictions that the court treated as felony "crimes of violence," one of which was a conviction for carrying a concealed firearm. The "career offender" classification resulted "in a substantial enhancement of [the petitioner's] Guidelines sentence" from 16 criminal history points to an offense level of 29. *Kendrick*, 2009 WL 2958976, at *1. The court found that because a "clear and dramatic break" from a "substantive rule of law" no longer rendered carrying a concealed firearm a crime of violence, Kendrick was incorrectly classified as a "career offender" and was entitled to resentencing. *Id.* at *2.

Here, Beckles's crime of unlawfully possessing a sawed-off shotgun does not suffice as a "crime of violence." Just as in *Kendrick*, one of the three "crimes of violence" necessary to sentence Beckles as a "career offender" is lacking. *See* U.S.S.G. § 4B1.1. That the crime at

issue in Beckles is the instant offense, as opposed to an underlying offense, is a distinction without a difference, as the Guidelines require that both the instant offense as well as a minimum of two underlying offenses be either crimes of violence or controlled substance offenses.

The Court makes clear that the circumstances presented here, on this record, are "exceptional," as the Court specifically remarked at Beckles's sentencing hearing that the sentence imposed was due to his career offender status — which was designated in contravention of *Begay/Archer/McGill*. Thus, the subsequent change in the law, although it may not have rendered Beckles's sentence "unlawful,"[10] has rendered his sentencing proceedings "irregular and invalid" given the available record. *Addonizio*, 442 U.S. at 186. As such, the "need for the remedy afforded [under Section 2255] is apparent." *Hill*, 368 U.S. 424, at 428. For these reasons, the Court finds Beckles's challenge to his sentence is cognizable under Section 2255.

IV. CONCLUSION

Accordingly, it is

ORDERED AND ADJUDGED that the Report of Magistrate Judge **[ECF No. 21]** is **NOT ADOPTED**. The Motion **[ECF No. 1]** is **GRANTED**. A new sentencing hearing will be scheduled under separate Order in Beckles's criminal case after the time for filing an appeal here has expired, or an appeal is concluded. Judgment in favor of Movant, Travis Beckles, and against Respondent, the United States of America, shall be set forth on a separate document entered in the civil docket. *See* FED. R. CIV. P. 58, 79(a).

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[10] The Court notes that its decision is not at odds with *Sun Bear v. United States*, 644 F.3d 700 (8th Cir. 2011) (*"Sun Bear II"*). In *Sun Bear v. United States*, 611 F.3d 925, 929 (8th Cir. 2010) (*"Sun Bear I"*), the court granted Section 2255 relief because "a post-conviction change in the law render[ed] unlawful the district court's sentencing determination." *Id.* at 930. That decision was overturned when the court reheard the case *en banc*. Specifically, the *en banc* panel held: "Sun Bear's 360-month sentence is not unlawful. An unlawful or illegal sentence is one imposed without, or in excess of, statutory authority." *Sun Bear II*, 644 F.3d at 705.

DONE AND ORDERED in Chambers at Miami, Florida, this 4th day of March, 2013.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Andrea M. Simonton
counsel of record

A - 7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-23517-CIV-ALTONAGA/SIMONTON

TRAVIS BECKLES,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
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REPORT AND RECOMMENDATION ON MOTION TO VACATE PURSUANT TO 28 U.S.C. § 2255

Movant Travis Beckles has filed a Motion to Vacate pursuant to 28 U.S.C. § 2255 attacking his federal sentence in Case No. 07-20305-CR-ALTONAGA (S.D. Fla. 2009) (DE # 1). The Government timely filed a Response to the Motion (DE # 8) and the Movant filed a Reply (DE # 9). The Motion was referred to the undersigned Magistrate Judge by the Honorable Cecilia M. Altonaga, United States District Judge (DE # 16). The Parties have also submitted Supplemental Briefs on the Motion (DE ## 19, 20), and an oral argument was held before the undersigned. For the following reasons, the undersigned recommends that the Motion to Vacate be DENIED.

I. INTRODUCTION

The Movant in the case at bar challenges the sentence he received following his conviction for being a felon in possession of a firearm. The basis for his challenge is that he was incorrectly classified as a career offender under the Sentencing Guidelines. The crux of the Movant's argument is that in determining career offender status under U.S.S.G. § 4B1.1, the Court improperly considered possession of a sawed-off shotgun to

be a crime of violence, contrary to the holdings in *Begay v. United States*, 533 U.S. 137 (2008); *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008); and *United States v. McGill*, 618 F. 3d 1273 (11th Cir. 2010), which were decided after the imposition of his sentence. The Government opposes relief in this case solely on the grounds that a challenge to the determination of a sentencing guideline range is not cognizable in a Motion brought pursuant to 28 U.S.C. § 2255.[1]

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[1] Due to Government's singular challenge to the Movant's Motion based upon cognizability, the undersigned does not address defenses and/or issues that might normally be presented to the Court during the briefing of a § 2255 Motion.

Specifically, in its initial response to the § 2255 Motion, the Government conceded that the issue in this case was raised on direct appeal and thus did not argue that the Movant had procedurally defaulted his claim. However, in a supplemental response and at oral argument, the Government suggested that the Court could *sua sponte* find a procedural default since the issue was not presented to the trial court and the Court of Appeals addressed the issue under a plain error standard of review. However, as discussed *infra* the undersigned declines the Defendant's request to *sua sponte* entertain this issue.

The Government also has not challenged the retroactive application of *Begay*. Thus, this Report and Recommendation does not discuss the retroactive application of *Begay* in the context of this case. *See Gilbert* v. *United States*, 609 F.3d 1159, 1165 (11th Cir. 2010) (accepting Government's concession of retroactivity of *Begay* and *Archer*) (vacated on other grounds, 640 F.3d 193 (11th Cir. 2011)(en banc)).

Moreover, the Government in opposition to the Motion did not contend that the career offender guideline was properly applied. However, at oral argument, the Government, for the first time, asserted that if Mr. Beckles were granted relief pursuant to § 2255, the Government intended to argue at the resentencing that Mr. Beckles still qualified as a career offender under the federal sentencing guidelines. Specifically, the Government stated its position that, although pursuant to the holdings in *Begay*, *Archer* and *McGill*, the offense of being a felon in possession of a firearm did not qualify as a crime of violence under the Armed Career Criminal Act ("ACCA"), Sentencing Guideline Application Note 1 to U.S.S.G. § 4B1.2 expressly lists possession of a sawed-off shotgun as a crime of violence, and this Guideline provision controls the instant case. According to the Government, Mr. Beckles, therefore, was properly treated by the sentencing court as a career offender. Even at oral argument, however, the Government did not assert this position as a basis for denying the Motion to Vacate, relying instead on its cognizability argument. The Government first mentioned this position in response to the Court's question regarding whether it conceded that, if Mr. Beckles' claim was

As discussed in more detail below, the Eleventh Circuit Court of Appeals has never directly addressed the cognizability under § 2255 of challenges to the applicability of the career offender guideline. In cases where the issue has been presented, the Court has relied instead upon alternative bases for denying relief, although the language used by the Court foreshadows denial of relief under the circumstances presented in the case at bar. Thus, based upon the case law and the arguments properly raised by the Parties, the issue before the Court is a narrow one–whether a defendant may obtain relief pursuant to 28 U.S.C. § 2255 where his advisory sentencing guideline range was incorrectly enhanced using the career offender guideline, he preserved the error for review on direct appeal, has timely filed his first Motion to Vacate pursuant to 28 U.S.C. § 2255, and there is a reasonable probability that he received a greater sentence than he would have received if his guideline range had been properly calculated; but the sentence imposed after giving him credit for providing substantial assistance to the government was below the unenhanced guideline range applicable to non-career offenders. After a thorough review of the facts of this case, the undersigned concludes that this determination is a close call, but based upon the rationale of the Eleventh

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cognizable, there is a reasonable probability that he would receive a lower sentence. The undersigned therefore does not address that issue herein.

The Government conceded at oral argument that there is a reasonable probability that if Mr. Beckles is re-sentenced without the application of the career offender enhancement, he would receive a lesser sentence. This concession is based upon the fact that when the sentence originally imposed upon Mr. Beckles was reduced based upon his substantial assistance to the Government, the Court imposed a 40% reduction to Mr. Beckles' sentence. Thus, the Government conceded that there is a reasonable probability that the Court would impose the same percentage reduction to a newly calculated guideline range, and this would result in a lesser sentence. The undersigned therefore accepts that assumption as true for purposes of this Report and Recommendation.

Circuit Court of Appeals in various analogous cases discussed below, the undersigned is constrained to conclude that Mr. Beckles' claim is not cognizable under § 2255 since he cannot establish the miscarriage of justice that is required to obtain relief from a non-constitutional error.

II. BACKGROUND

The facts of this case are relatively straightforward. On April 24, 2007, Movant Travis Beckles was charged in a one-count indictment with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g) (Cr. DE # 6).[2] On August 2, 2007, the jury convicted Mr. Beckles of this offense (Cr. DE ## 41, 42). A Pre-sentence Investigation Report (PSI) was prepared which recommended, *inter alia*, that Mr. Beckles be sentenced as a career offender pursuant to Sections 4B1.1 and 4B1.4 of the United States Sentencing Guidelines ("U.S.S.G." or "sentencing guidelines") since "[Mr. Beckles] was at least 18 years old at the time of the instant offense, the instant offense was a felony crime of violence, and because [he] has at least two prior felony convictions of a controlled substance offense" (DE # 1 at 2, quoting PSI ¶ 18).[3] The PSI also recommended that Mr. Beckles be sentenced as an armed career criminal pursuant

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[2] References to the documents contained in the Criminal Docket in the Report and Recommendation are designated as (Cr. DE # _____).

[3] The United States Federal Sentencing Guidelines § 4B1.1. entitled "Career Offender" provides,

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

to the Armed Career Criminal Act, 18 U.S.C. § 924(e) due to his three prior convictions for controlled substance offenses (DE # 1 at 2).[4]

Based upon the enhancements, the PSI calculated Mr. Beckles' adjusted offense level at 37 and calculated Mr. Beckles' criminal history category at a level VI pursuant to U.S.S.G. § 4B1.1(b) (DE # 1 at 2, citing PSI ¶ 41). Based on those calculations, therefore, Mr. Beckles' sentencing guideline range was 360 months to life (DE # 1 at 2, citing PSI ¶ 79). Based upon the applicability of the career offender guideline, Mr. Beckles was sentenced to 360 months of imprisonment (Cr. DE # 69 at 2).

It is not disputed that absent the career offender enhancement, Mr. Beckles' adjusted offense level would have been 34 and his criminal history category would have been level VI. 26 U.S.C. § 5845(a); U.S.S.G. §§ 4B1.4(b)(3)(A), 4B1.4(c)(2). In addition, without the career offender enhancement, Mr. Beckles' guideline sentencing range would have been between 262 and 327 months. U.S.S.G. § 5A. (DE # 1 at 10).

Mr. Beckles timely appealed his sentence, arguing, among other things, that because his conviction for being a felon in possession of a firearm was not a crime of violence, he was wrongfully sentenced as a career offender. While Mr. Beckles' case was on appeal, and after briefing was completed, the United States Supreme Court decided *Begay v. United States*, 533 U.S. 137 (2008), which narrowed the definition of what constituted a violent felony under the Armed Career Criminal Act; and, the Eleventh Circuit decided *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008), which held that the definition of "violent felony" for purposes of the Armed Career Criminal Act is

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[4] The "Armed Career Criminal Act" (ACCA), 18 U.S.C. § 924 (e)(1) provides for a minimum fifteen-year sentence for persons convicted of violating 18 U.S.C. § 922(g), which makes it a crime to be a felon in possession of a firearm, if that person has three previous convictions for a violent felony or a serious drug offense, or both.

"virtually identical" to the definition of a crime of violence for purposes of the career offender guideline enhancement, and that the crime of carrying a concealed firearm is not a crime of violence.

The Eleventh Circuit affirmed Mr. Beckles' conviction and sentence, holding that possession of a sawed-off shotgun was a crime of violence within the meaning of U.S.S.G. § 4B1.1 (Cr. DE # 121). The opinion of the Court did not mention either *Begay* or *Archer*, although it was filed on April 17, 2009, after those cases had been decided.[5] Mr. Beckles petitioned the Supreme Court for a writ of certiorari, which was denied on October 5, 2009. *Beckles v. United States*, 130 S.Ct. 272 (Cr. DE # 132).

On April 7, 2010, the government filed a motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure (Cr. DE # 133 at 1-2), which was granted. Although the Government sought a reduction of only 20%, the Court reduced Mr. Beckles' sentence by 40 percent, to 216 months' imprisonment instead of the 360 months that he initially received (DE # 18; Cr. DE # 150).

On September 30, 2010, the Movant timely filed the instant Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 (DE # 1).

The Government filed a response to the Motion to Vacate (DE # 8), and the Movant filed a Reply (DE # 9). The action was stayed however, pending the outcome of the Eleventh Circuit's en banc rehearing in the matter of *Gilbert v. United States*, 625 F.3d 716 (11th Cir. 2010), a case which addressed, among other things, whether a defendant

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[5] It appears that those cases were brought to the Court's attention through notices of supplemental authority, but the Government has not argued that relief in this case is precluded on the grounds that § 2255 may not be used to relitigate matters decided on direct appeal. *Davis v. United States*, 417 U.S. 333, 346-47 (1974). (DE # 1 at 3).

who had been sentenced as a career offender pursuant to the United States Sentencing Guidelines, was entitled to § 2255 relief, after one of the convictions which was relied upon for the career offender enhancement was later determined not to be a "crime of violence" (DE # 10). After the Eleventh Circuit issued its en banc opinion in *Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011), the matter was referred to the undersigned, and the Parties were directed to file supplemental briefs in light of the *Gilbert* en banc opinion (DE # 17).[5] The Movant filed his Supplemental Brief (DE # 17), the Government responded (DE # 20), and the Movant filed a Reply (DE # 24).

On March 9, 2012, the undersigned held oral argument on the Motion to Vacate (DE # 26).

III. THE POSITIONS OF THE PARTIES

In the Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255, Mr. Beckles contends that he is entitled to have his sentence vacated because the crime for which he was convicted and sentenced, possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1), is no longer considered a crime of violence for purposes of applying a career offender enhancement pursuant to §§ 4B1.1 and 4B1.2 of the United States Sentencing Guidelines (DE # 1). As such, the Movant contends that he should have been sentenced under the guidelines only as an armed career criminal with a total

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[5] Specifically, the undersigned directed the Parties to file supplemental briefs to address the following: a) The effect of the Eleventh Circuit's decision in *Gilbert* on the action at bar, including the effect, if any, of the Petition for Certiorari then pending before the Supreme Court; and, b) Whether a sentence imposing less than the statutory maximum, but based upon an incorrect calculation of the sentencing guidelines, may constitute a miscarriage of justice which is cognizable on a Motion to Vacate under 28 U.S.C. § 2255; and the effect on this determination if the sentence ultimately imposed as a result of a reduction is within the "correct" sentencing guideline range; as well as, whether this result is changed if the sentence is imposed under "advisory" rather than "mandatory" guidelines. (DE # 17).

offense level of 34 and a criminal history category of VI, which carries a guideline sentencing range of 262-327 months (DE # 1 at 10). The Movant contends that because he was improperly deemed a career offender, the sentencing Court misapplied the career offender enhancement and incorrectly calculated the total offense level of 37 and a criminal history of VI, for a guideline range of 360 months to life imprisonment, and sentenced him to 360 months. The Court later reduced his sentence by 40% to 216 months, based upon his substantial assistance to the Government. The Movant contends that if he had been sentenced under the correct guideline without the career offender enhancement and his sentence was then reduced by 40%, he would currently be serving a sentence between 180 and 196 months, which is well below the sentence he received.[7]

The Movant asserts that his sentence was imposed in violation of the Constitution and laws of the United States, and is therefore cognizable under § 2255 (DE # 9). He contends that his due process rights were violated because his sentence was based upon misinformation concerning his career offender status. Similarly, Mr. Beckles argues that the change in law regarding what constitutes a violent felony for purposes of classifying a defendant as a career offender is a substantive change in the law, which resulted in a fundamental miscarriage of justice regarding his sentence since the incorrect law was applied to his sentence, and he therefore received a harsher sentence than he would have received had the correct law been applied. Finally, Mr. Beckles distinguishes those cases which have declined to consider challenges to sentencing

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[7] Although 40% of the lower end of the guideline range computed without the career offender enhancement is only 157 months, Mr. Beckles acknowledges that he was properly classified as an armed career criminal and is subject to a mandatory minimum sentence of 15 years (180 months) pursuant to 18 U.S.C. § 924(e) (DE # 1 at 10).

guidelines determinations on collateral review, asserting that any need to foreclose review pursuant to § 2255 in the interests of finality does not apply to this case, where his claim was preserved on direct appeal, this is his first motion for relief under § 2255, and this motion was timely filed.

In its response to the Motion to Vacate, the Government concedes that Mr. Beckles' § 2255 Motion is timely. However, the Government contends that Mr. Beckles is not entitled to relief pursuant to § 2255 because the sentencing defect is not a constitutional claim, does not involve a lack of jurisdiction, does not relate to a sentence that exceeds the statutory maximum, does not lead to a complete miscarriage of justice, and is thus not cognizable under § 2255 (DE # 8 at 5). The Government asserts that challenges to the advisory sentencing guidelines are materially different than challenges to sentences that are in excess of the statutory maximum and different from cases where a prior conviction that served as the basis of an enhancement is vacated. The Government further contends that Mr. Beckles' statutory sentencing range as an armed career criminal was between fifteen years and life imprisonment, and thus the sentence that Mr. Beckles received fell within the statutory range; and, the Government notes that the 360-month sentence that Mr. Beckles initially received "was only 33 months above the 'correct' guideline range." (DE # 8 at 12). Further, the Government emphasizes the difference in the scope of review for claims raised on direct appeal versus those raised in a collateral proceeding, and contends that an error that may justify reversal on appeal does not necessarily mean that the same issue is cognizable in the § 2255 context (DE # 20). In addition, the Government contends that the ruling of the Eleventh Circuit Court of Appeal in *Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1001 (2012), is relevant to this action because the reviewing Court in *Gilbert*,

among other things, flatly rejected the movant's claim that his career offender enhancement at sentencing constituted a miscarriage of justice because he was actually innocent of being a career offender; and further, because the Court made clear that a challenge to a misapplied guideline does not rise to a constitutional violation. The Government argues that the holding in *Gilbert* emphasizes the need for finality in criminal actions and the inapplicability of § 2255 to guideline calculation errors.

The Government also, in essence, asserts that because the federal sentencing guidelines are now advisory, a miscarriage of justice may not be based upon the misapplication of the career offender guideline (DE # 20 at 13-14). Further, the Government contends that because Mr. Beckles' sentence falls within the statutory limits, a sentence that exceeds a particular guideline range does not constitute a miscarriage of justice. The Government also contends that because the Court could impose the same sentence upon Mr. Beckles at resentencing, that sentence cannot be considered to be a fundamental defect in the proceedings so long as that sentence is reasonable. Finally, in a footnote, in its Supplemental Response the Government argues that the Movant procedurally defaulted on the sentencing issue by failing to raise the claim before the District Court at sentencing (DE # 20 at 12 n.7). The Government states, however, that the Government inadvertently failed to raise this issue in its initial response to the Movant's Motion and thus concedes that it waived the procedural default argument. The Government therefore urges the Court to *sua sponte* invoke the procedural bar to this action.

IV. LEGAL FRAMEWORK

Title 28 United States Code, section 2255, entitled "Federal custody; remedies on motion attacking sentence" provides, *inter alia*,

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Thus, § 2255 "does not encompass all claimed errors in conviction and sentencing." *United States v. Addonizio*, 442 U.S. 178, 185 (1979). Rather, a federal prisoner may file a § 2255 motion if the movant claims that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a).

The Supreme Court has made clear that an error of law provides a basis for collateral attack only when "the claimed error constitute[s] a fundamental defect which inherently results in a complete miscarriage of justice." *Addonizio*, 442 U.S. at 185; *accord Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) ("relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice") (internal quotation marks and citations omitted). A non-constitutional error that may justify reversal on direct appeal does not generally support a collateral attack on a final judgment, unless the error (1) could not have been raised on direct appeal and (2) would, if condoned, result in a complete miscarriage of justice. *Lynn*, 365 F.3d at 1233 (citations omitted). A non-constitutional error that results in a miscarriage of justice "should present exceptional circumstances where the need for the remedy afforded by the writ of habeas

corpus is apparent." *Hill v. United States*, 368 U.S. 424, 428 (1962) (quotation omitted). Errors that seriously undermine the validity of criminal proceedings have been held to constitute a miscarriage of justice. *See, e.g., Davis v. United States*, 417 U.S. 333, 346-47 (1974) (holding that a prisoner's claim that he was convicted for a legal act was cognizable under § 2255); *United States v. Behrens*, 375 U.S. 162 (1963) (holding that prisoner was entitled to relief under § 2255 where his sentence was imposed outside of the prisoner's or counsel's presence); *Ayuso v. United States*, 361 Fed. App'x 988, 991 (11th Cir. 2010) (distinguishing guideline miscalculation sentencing claims from errors that constitute a miscarriage of justice which implicate a fundamental defect in the validity of the district court proceedings).

V. ANALYSIS [1]

A. The Motion to Vacate pursuant to § 2255 is Timely

The Government concedes that Mr. Beckles' Motion to Vacate is timely, and the undersigned agrees with that concession. Pursuant to Title 28, United States Code,

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[1] As stated previously, the undersigned has not analyzed the issues which the Government has "mentioned" in the course of proceedings, but not relied on in presenting its opposition. Specifically, the Government has not challenged the retroactive applicability on collateral review of the holdings in *Begay* or *Archer* regarding what constitutes a crime of violence, or that these decisions control the interpretation of the career offender provision of the Sentencing Guidelines in the context of this Motion to Vacate. In addition, the undersigned declines to engage in the Government's suggestion that the Court *sua sponte* determine that the Movants' claims are procedurally defaulted because the Movant did not present the career offender enhancement argument to the District Court. It is undisputed that the Movant raised such arguments on direct appeal and the Eleventh Circuit considered the merits of the arguments, and thus the Movant has satisfied the requirement that collateral issues that are capable of being raised on direct appeal must be so raised. Under the procedural default rule, "a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding." *Lynn*, 365 F.3d at 1234. In addition, the Government has waived this argument by failing to raise it in its initial response to the Motion to Vacate.

Section 2255(f)(1), a Motion to Vacate is timely if it is filed within one year from the date the conviction becomes final. When a defendant files a petition for a writ of certiorari with the Supreme Court following a direct appeal, the conviction becomes final when the Supreme Court either denies certiorari or issues a decision on the merits. *Washington v. United States*, 243 F.3d 1299, 1300–01 (11th Cir. 2001). In this case, the Supreme Court denied Mr. Beckles' petition for a writ of certiorari on October 22, 2009, and the one-year statute of limitations began to run the day after that denial. Thus, because Mr. Beckles filed his Motion to Vacate on September 30, 2010, his Motion to Vacate is timely.

B. **Mr. Beckles' § 2255 Non-Constitutional Claim is not Cognizable on Collateral Review as His Sentence Does Not Constitute a Fundamental Defect Resulting in a Miscarriage of Justice**

1. **Mr. Beckles' Has Not Raised a Cognizable Claim Pursuant to the United States Constitution or the Laws of the United States**

The Eleventh Circuit has stated that, as a threshold matter, a court examining a motion to vacate a sentence must determine whether the claim is cognizable. *Burke v. United States*, 152 F.3d 1329, 1331 (11th Cir. 1998); *Ayuso v. United States*, 361 Fed. App'x 988 (11th Cir. 2010). By the plain language of 18 U.S.C. § 2255, claims raised in a motion to vacate which assert that a sentence is imposed in violation of the Constitution or in violation of the laws of the United States are cognizable upon collateral review.

In the instant case, the Movant argues that his sentence was imposed in violation of the Constitution (DE # 9 at 2).[9] Specifically, the Movant asserts that his constitutional

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[9] In the Motion to Vacate, Mr. Beckles did not address the issue of cognizability under § 2255 but rather only argued that his sentence should be set aside due to the rulings in *Begay* and *Archer* which concluded that a felon in possession of a firearm did not constitute a crime of violence. When the Government in response to the Motion raised the issue of cognizability, Mr. Beckles addressed the issue for the first time in his Reply.

due process rights were violated when the Court misapplied the guidelines. However, that argument has been rejected by the Eleventh Circuit. In *Gilbert v. United States*, the Eleventh Circuit Court of Appeals, sitting en banc stated,

> Gilbert's claim that a sentencing guidelines provision was misapplied to him is not a constitutional claim. If it were, every guidelines error would be a constitutional violation. However prescient the Founders may have been in other respects, they did not think to incorporate the sentencing guidelines into the Constitution or Bill of Rights. Nor is it plausible to suggest, as Gilbert does, that every error adversely affecting a defendant's sentence violates the Due Process Clause. Sometimes a cigar is just a cigar, and sometimes an error is just an error.

640 F. 3d at 1321-22. Further, the cases cited by the Movant to support his claim that his constitutional due process rights were violated are distinguishable from the case at bar because those cases involved a sentencing court's misapprehension of certain underlying facts related to a defendant's conviction. In *Townsend v. Burke*, 334 U.S. 736 (1948), the Supreme Court stated that a trial court violates the constitutional right to due process when it relies on "extensively and materially false" information, which the defendant had no opportunity to correct through counsel. There is no dispute that Mr. Beckles was represented by counsel and given an opportunity to challenge the district court's factual determinations with regard to his sentence. Similarly, in *Shukwit v. United States*, 973 F. 2d 903 (11th Cir. 1992), the movant raised a factual objection to a misstatement in the PSI regarding whether the defendant was a "principal" or "main distributor" of controlled substances. In finding that the defendant was entitled to § 2255 relief, the Court opined that a defendant has the right to not be sentenced on the basis of false information, which clearly is a different issue than the issue raised in this case–whether a change in definition under the guidelines raises a cognizable issue under

§ 2255. Further, the court in *United States v. Dean*, 757 F. 2d 535 (11th Cir. 1985), considered whether a sentence predicated upon the sentencing Court's mistaken assumption about the length of time that the defendant would serve in prison prior to parole violated the defendant's due process rights and would entitle a defendant to collateral relief.[10] In this case, the sentencing Court did not sentence Mr. Beckles based upon factual inaccuracies, rather, Mr. Beckles challenges the Court's sentence based upon a purported legal error in the application of the guidelines. As stated above, *Gilbert* holds that such a challenge does not raise a constitutional issue. Thus, the Movant has failed to present a cognizable constitutional claim under the facts of this case.

Similarly, to the extent that the Movant argues that Mr. Beckles' sentence was imposed in violation of the laws of the United States, that argument fails, as well (DE # 9 at 4). First, it is undisputed that Mr. Beckles was sentenced within the statutory maximum for his conviction. Generally, when the sentence falls within the statutory range, it is not a cognizable constitutional issue in habeas proceedings. *Townsend v. Burke*, 334 U.S. 736, 741 (1948). In addition, in *Gilbert*, 640 F.3d at 1307-07, the Eleventh Circuit cited, with seeming approval, *Scott v. United States*, 997 F.2d 340, 341 (7th Cir. 1993), for the proposition that sentencing guidelines are not "laws" within the meaning of § 2255. It is for a similar reason that the Movant's reliance on *Davis v. United States*, 417 U.S. 333, 346 (1974), is misplaced. *Davis* examined the imposition of a sentence based upon a substantive change in the law which rendered the defendant's conduct no longer criminal and thus did not involve a purported misapplication of the guidelines, which

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[10] Notably, the Court in *Dean* concluded that the "mistake" by the sentencing court regarding the length of time the defendant would serve did *not* render the sentence illegal and did not violate the defendant's constitutional due process rights. *Id.* at 543.

again, are not laws. In this case, as discussed in greater detail below, there is no assertion that possession of a shot gun by a felon is not a crime. Thus, *Davis* is inapplicable. The Movant has therefore failed to point to any law of the United States that his sentence violated, and thus has failed to state a cognizable claim based upon such a violation.

2. **Neither the Eleventh Circuit nor Courts in this District Have Held that a Career Offender Guideline Application Error is Cognizable under § 2255**

In the Eleventh Circuit, whether a challenge to a sentence based upon a misapplication of the guideline sentencing range, which does not exceed the statutory maximum penalty, is ever cognizable on collateral review remains an open issue.[11] Indeed, over the past few years, the Eleventh Circuit has consistently declined to determine whether a purported misapplication of a guideline range is cognizable on an initial § 2255 motion such as the one at bar. However, in order to place this matter into proper context, and to evaluate the cognizability of the Movant's claim, it is helpful to examine recent holdings in this circuit regarding § 2255 challenges to the application of the Federal Sentencing Guidelines.

In *Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011) (en banc), for example, the Eleventh Circuit examined whether a federal defendant who asserted that the district court had erroneously calculated his guideline sentence was entitled to relief pursuant to the savings clause contained in 28 U.S.C. § 2255(e).[12] In *Gilbert*, the defendant was

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[11] As mentioned previously, in the Introduction, the Government has only properly challenged the Movant's Motion on the basis of whether Mr. Beckles raised a cognizable claim and not on the basis of procedural default or any other grounds.

[12] Section 2255(e) permits a federal prisoner to seek habeas corpus relief only if the remedy of filing a Motion to Vacate pursuant to § 2255(a) "is inadequate or ineffective

sentenced as a career offender under § 4B1.1 of the Federal Sentencing Guidelines based on two prior convictions, one of which was carrying a concealed weapon, which was deemed at the time of his sentencing to be a "crime of violence." *Id.* at 1299. Although the defendant argued prior to his sentencing and on direct appeal that carrying a concealed weapon did not qualify as a crime of violence, he failed to raise that issue in his initial *pro se* § 2255 motion. *Id.* at 1301. Several years after his initial § 2255 motion was denied, Mr. Gilbert, through counsel, filed a motion seeking to amend his § 2255 motion to raise additional issues including challenging the application of the career offender enhancement to his sentence, in light of the Supreme Court's holding in *Begay* and the Eleventh Circuit's holding in *Archer*. The district court denied Mr. Gilbert's motion to amend concluding that the motion was actually a successive § 2255 motion barred by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). That determination was initially overturned by the Eleventh Circuit but subsequently was affirmed by the Eleventh Circuit en banc after a rehearing on the issue. Although the en banc Court in *Gilbert* characterized the primary question presented as "whether a federal prisoner can use a habeas corpus petition to challenge his sentence" and proceeded to answer that question in the negative where the sentence did not exceed the statutory maximum, the Court explicitly stated that it was not deciding whether a guideline misapplication claim based upon a change in the law could ever be brought in an initial § 2255 motion. *Id.* at 1306. Therefore, the Court was not directly presented with the issue of whether Mr. Gilbert's claim may have been cognizable on his initial § 2255, but rather only determined that the savings clause of § 2255(e) which provides for relief pursuant to

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to test the legality of his detention."

§ 2241 under certain circumstances, may not be used to remedy a miscalculation of the sentencing guidelines where that issue may no longer be raised on a § 2255 motion. *Id.* at 1307.

Similarly, in *McKay v. United States*, 657 F.3d 1190 (11th Cir. 2011), the Eleventh Circuit declined to determine whether a defendant who asserted that he was improperly designated as a career offender pursuant to U.S.S.G. § 4B1.1 raised a cognizable § 2255 challenge. The movant argued to the district court that his sentence was illegal because, pursuant to the rulings in *Begay* and *Archer*, one of his prior convictions was no longer considered to be a crime of violence. The district court denied the movant's § 2255 motion based upon its determination that a claim of a misapplication of the guidelines was not cognizable under § 2255 absent a showing that the issue could not have been raised in direct appeal and if the court's failure to grant relief would result in a complete miscarriage of justice. *Id.* at 1195. Although the District Court denied the defendant's request for a Certificate of Appealability, the Eleventh Circuit granted the movant a Certificate of Appealability, framing the issue for appeal as follows, "Whether the district court erred in finding [McKay's] sentencing claim about the career-offender enhancement is not cognizable in proceedings under 28 U.S.C. § 2255, and, if cognizable, whether this sentencing claim is procedurally defaulted in any event." *Id.* at 1195. However, in its opinion on the § 2255 Motion, the Eleventh Circuit never reached the issue of cognizability but instead stated, "Because we hold that McKay's sentencing claim is procedurally defaulted and that the actual innocence exception does not apply to excuse his default, we leave for another day the question of whether this type of claim is cognizable under § 2255 in the first instance." *Id.* at 1195. *See also Orso v. United States*, 452 Fed. App'x 912, 913 n.4 (11th Cir. 2012) (assuming without deciding that movant

raised cognizable § 2255 claim attacking sentence predicated on misapplication of federal sentencing guideline career offender enhancement, and then denying claim as procedurally defaulted); *Rivers v. United States*, 476 Fed. App'x, 848, 850 n.1 (11th Cir. May 21, 2012) (declining to determine whether § 2255 movant's claim that he was actually innocent of crime of violence under guidelines was cognizable, and instead denying relief because motion was procedurally defaulted).

While the Eleventh Circuit has not determined this exact issue but has rather denied § 2255 guideline sentencing claims on procedural grounds, the undersigned is aware that several other district courts have examined whether a movant challenging the application of the career offender guideline enhancement raised a cognizable claim in an initial § 2255 motion.[13] In *Gonzalez v. United States*, No. 8:11-cr-1474-T-17EAJ, 2012 WL 279451, at *1 (M.D. Fla. Jan. 31, 2012), for example, a district court examined a motion to vacate pursuant to § 2255 which challenged the court's designation of the movant as a career offender at sentencing based upon a crime that was subsequently determined to not qualify as a crime of violence for purposes of the career offender enhancement. Although the Court determined that the Movant's motion was procedurally barred as untimely and due to his failure to raise the issue on direct appeal, the Court also determined that the claim was not cognizable in a § 2255 proceeding. In so doing, the

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[13] The undersigned is aware that in *Young v. United States*, 936 F.2d 533 (11th Cir. 1991), which the Movant cites in his Supplemental Brief (DE # 19 at 5), the Eleventh Circuit granted relief pursuant to a § 2255 Motion, where the movant sought to vacate his sentence which included a career offender enhancement under the guidelines. However, the Court in *Young* never addressed the cognizability issue and thus that opinion does not provide any direct guidance on the cognizability issue in this case. In addition, the undersigned notes that the Court's opinion was issued prior to the Eleventh Circuit's recent decisions in *Gilbert* and *McKay*. Notably, the Eleventh Circuit did not cite the *Young* decision for purposes of analyzing the scope of collateral relief in either of those cases.

Court first noted that neither the Supreme Court nor the Eleventh Circuit had ever held that an error in the application of the sentencing guidelines, that does not result in the imposition of a sentence that exceeds the statutory maximum for the offense of conviction, presents a constitutional claim. *Id.* at *5. The Court, therefore, concluded that the Movant had not identified a constitutional claim which would normally be cognizable on a § 2255 challenge.

The Court then examined whether the movant had raised a claim that constituted a "fundamental defect which inherently resulted in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure." *Id.* at *5. In so doing, the Court observed that certain claimed errors, even if meritorious on direct appeal, are not cognizable in a § 2255 proceeding. *Id., citing Lynn v. United States*, 365 F 3d 1225 (11th Cir. 2004). In addition, the Court noted that neither the Supreme Court nor the Eleventh Circuit had held that an ordinary error in the application of the sentencing guidelines, even one that erroneously results in the application of the career offender guideline to increase a defendant's offense level significantly, constitutes the type of non-constitutional error that is cognizable in a § 2255 proceeding. Finally, the Court observed that the movant's sentence was well within the applicable statutory maximum term of imprisonment. The Court therefore concluded that the movant's sentence, viewed objectively, was not "illegal" or a "miscarriage of justice" because it conformed to the applicable penalty statute, did not exceed the statutory maximum, and could be reimposed even without the career offender enhancement. *Id.* at *6.

Similarly, in *Harris v. United States*, No. 8:11-CV-T-30TBM, 2011 WL 5834749, at *1 (M.D. Fla. Nov. 21, 2011), a district court opined that an initial § 2255 motion which challenged the application of the career offender enhancement as improper because one

of the underlying crimes upon which the enhancement was predicated was subsequently determined not to be a crime of violence, did not entitle the movant to relief because the motion was untimely. However, the Court noted that even if the motion to vacate had been timely, the movant still would not be entitled to relief because a challenge to a trial court's application of the sentencing guidelines is a non-constitutional issue that provides no basis for collateral relief. *Id.* at *3 (citing *Lynn v. United States*, 365 F.3d 1225 (11th Cir. 2004); *Burke v. United States*, 152 F.3d 1329, 1331-32 (11th Cir. 1998)); *accord Ware v. United States*, No. 09-60185-CIV, 2009 WL 2567023, * 8 (S.D. Fla. May 14, 2009) (denying § 2255 claim of improper application of guidelines as a non-cognizable claim absent a fundamental defect rising to miscarriage of justice, and collecting other cases denying § 2255 motions predicated upon a misapplication of the guidelines).

In this case, although the Movant raised the career offender enhancement issue on direct appeal, and timely filed his Motion to Vacate, much like the movants in *Gonzalez* and *Harris*, Mr. Beckles has not asserted that a misapplication of the sentencing guidelines resulted in the imposition of a sentence in excess of the statutory maximum penalty for his crime of conviction. Rather, the Movant has only contended that the sentencing Court misapplied the guidelines to his sentence which resulted in a sentence higher than the sentence he would have received had the correct guideline been applied. As stated above, and made clear by the applicable case law, such a claim is not cognizable on a § 2255 motion seeking collateral relief. This conclusion is not altered by the fact that this same claim may have entitled the movant to relief if it had been raised on direct appeal after the Supreme Court's ruling in *Begay* and the Eleventh Circuit's ruling in *Archer*. Rather, as stated above, § 2255 "does not encompass all claimed errors in conviction and sentencing." *United States v. Addonizio*, 442 U.S. 178, 185 (1979). As

such, the movant has not raised a cognizable claim.

3. **The Movant's Sentence Does Not Constitute a Fundamental Miscarriage of Justice**

Even assuming *arguendo* that guideline sentencing errors may be cognizable under § 2555, the Movant is still not entitled to relief as he has failed to demonstrate that his sentence constitutes a miscarriage of justice. Indeed, as correctly stated by the Movant in his Reply brief and conceded at oral argument, the central issue in this matter is whether the "misapplication" of the career offender guideline presents a fundamental miscarriage of justice (DE # 24-4). Implicit in this query is the fact that, as discussed above, typically sentencing errors based upon a misapplication of the guidelines are not cognizable on § 2255 grounds, unless there is a fundamental miscarriage of justice. Thus, the undersigned examines what constitutes a fundamental miscarriage of justice to determine whether Mr. Beckles is entitled to relief pursuant to § 2255.

In *Johnson v. Alabama*, 256 F.3d 1156 (11th Cir. 2001), the Eleventh Circuit described a "fundamental miscarriage of justice" as follows,

> If a petitioner cannot show cause, he may still survive a procedural bar by proving that the failure to hear the merits of his claim would endorse a fundamental miscarriage of justice. *See Murray*, 477 U.S. at 495, 106 S.Ct. at 2649. This exception is exceedingly narrow in scope, as it concerns a petitioner's "actual" innocence rather than his "legal" innocence. *See Calderon v. Thompson*, 523 U.S. 538, 559, 118 S.Ct. 1489, 1502-03, 140 L.Ed.2d 728 (1998); Murray, 477 U.S. at 495-96, 106 S.Ct. at 2649 (explaining that a "fundamental miscarriage of justice" occurs "in an extraordinary case, where a constitutional violation has resulted in the conviction of someone who is actually innocent").

Id. at 1171. In *Johnson*, although the Court considered whether a fundamental miscarriage of justice had occurred which was sufficient to overcome a procedural bar in the § 2254 context, the Court's language illustrates that the miscarriage of justice

standard is exceedingly narrow in scope.

Consistent with this conclusion, in *Ayuso v. United States*, 361 Fed. App'x 988 (11th Cir. 2010), the Court, in rejecting a movant's § 2255 challenge to his sentence predicated upon a miscalculation of his criminal history points stated,

> A non-constitutional error that results in a miscarriage of justice "should present exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Hill v. United States*, 368 U.S. 424, 428 (1962) (quotation omitted). Errors that seriously undermine the validity of criminal proceedings have been held to constitute a miscarriage of justice. *See, e.g., Davis v. United States*, 417 U.S. 333, 346-47 (1974) (holding that a prisoner's claim that he was convicted for a legal act was cognizable under § 2255); *United States v. Behrens*, 375 U.S. 162, 164-66 (1963) (holding that prisoner was entitled to relief under § 2255 where his sentence was imposed outside of the prisoner's or counsel's presence).

Id. at 991 (parallel citations omitted). The Court continued:

> Here, Ayuso's sentencing claim is not cognizable under § 2255 because it is not a constitutional error and does not rise to the level of a miscarriage of justice. In his pleadings below and in his brief on appeal, Ayuso does not indicate that the alleged miscalculation of his criminal points implicates a constitutional error. In addition, Ayuso's sentencing claim is distinguishable from those errors that have been held to constitute a miscarriage of justice, as these errors implicated a fundamental defect in the validity of the district court proceedings.

Id. Similarly, in *Vallas v. United States*, No. 09-00754-CG, 2012 WL 2681398, at * 5 (S.D. Ala. June 7, 2012), a district court concluded that a movant's § 2255 claim that a misapplication of guidelines prior to a change in law as to what constituted a crime of violence for purposes of calculating the movant's criminal history points, did not "so 'seriously undermine[d] the validity of [his] criminal proceedings' that it would, if condoned constitute a miscarriage of justice." *Id.* at *5, citing *Ayuso v. United States*, 361

Fed. App'x 988, 991 (11th Cir. 2010).

Based upon the applicable case law, under the facts of this case, Mr. Beckles is not entitled to relief on the grounds of a miscarriage of justice because his sentence does not meet that exceedingly narrow scope that implicates a fundamental defect in the validity of the district court proceedings. Indeed, it is undisputed that had Mr. Beckles been sentenced without a guideline career offender enhancement, his guideline sentencing range would have been between 262 and 327 months. In addition, it is undisputed that even without the guideline career offender enhancement, Mr. Beckles would be subject to a fifteen year minimum mandatory sentence (180 months) pursuant to 18 U.S.C. § 924(e), the Armed Career Criminal statute. Finally, due to the Rule 35 reduction awarded to Mr. Beckles, he is currently serving a sentence of 216 months. Mr. Beckles therefore is currently serving a sentence which is 46 months below the guideline range that the Movant contends is the proper guideline range. As such, under the facts of this case, Mr. Beckles has failed to show that his sentence is "illegal" or a "miscarriage of justice" as it does not exceed the statutory maximum and could be reimposed even without the career offender enhancement. The undersigned is therefore unable to conclude that his sentence constitutes a miscarriage of justice, and thus he is not entitled to relief pursuant to § 2255.[14]

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[14] Although the Movant contends, and the Government concedes, that the sentencing court likely would have granted the Movant a 40% reduction on his sentence even if he had been sentenced to the correct guideline at his initial sentencing, this fact does not alter the conclusion that a challenge to the misapplication of the guidelines does not present a cognizable § 2255 claim where the movant is already serving a sentence within the correct guideline range and the sentence does not exceed the statutory maximum.

4. The Movant is not Actually Innocent of Being a Career Offender

The Movant attempts to demonstrate that his sentence rises to the level of a miscarriage of justice and thus is cognizable on a § 2255 claim, by implying that Mr. Beckles is actually innocent of being a career criminal (DE # 19 at 4). In this regard, Mr. Beckles does not assert that he is actually innocent of being a felon in possession of a firearm. Rather, he contends that because the career offender enhancement requires a finding that the crime of conviction is a "crime of violence," which the crime of felon in possession is not, that he is not a career offender under the guidelines.

This very argument was rejected by the Eleventh Circuit in *McKay* and *Gilbert*. The Eleventh Circuit has consistently held that actual innocence in sentencing can only be established if the person is factually innocent of the underlying crime, or if the crime for which the person is sentenced is later determined to not constitute criminal conduct.[19]

In *Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011) (en banc), although the Court considered whether the Movant had properly presented an actual innocence claim in the context of whether that claim was sufficient to overcome a procedural default, that case nonetheless provides guidance as to whether Mr. Beckles has presented an "actual innocence" claim in this action. The movant in *Gilbert* argued, *inter alia*, that he was actually innocent of being a career offender, but the Eleventh Circuit categorically rejected that claim, explaining that the defendant was neither charged with, nor convicted of, being a career offender. *Id.* at 1304–05. *Accord Bido v. United States*, 438 Fed. App'x

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[19] For purposes of this Report and Recommendation, the undersigned assumes, without deciding, that actual innocence of sentence claims may be raised in a non-capital sentencing context. *See Rivers v. United States*, 476 Fed. App'x 848, 849-50 (11th Cir. 2012) (discussing limitation of actual innocence exception to procedural default context where movant challenges imposition of non–capital sentence).

746 (11th Cir. 2011) (rejecting movant's actual innocence claim of guideline misapplication raised in an attempt to excuse procedural default of § 2255 claims).[16]

Similarly, in *McKay v. United States*, 657 F.3d 1190, 1196–97 (11th Cir. 2011), the Eleventh Circuit rejected a petitioner's § 2255 actual innocence claim where the petitioner argued that his conviction for carrying a concealed weapon had been misclassified as a crime of violence for purposes of a § 4B1.1 sentence enhancement. *Id.* at 1194–95. The reviewing Court denied the petitioner's claim, opining that an alleged misclassification of a crime was a legal argument, and the petitioner did not assert that he was factually innocent of carrying a concealed weapon. *Id.* at 1199. Thus, the Court declined to extend the actual innocence of sentence exception to claims of legal innocence of a predicate offense used to justify an enhanced sentence. *Accord Stevens v. United States*, 446 Fed. App'x 789 (11th Cir. 2012) (same).

Finally, in *Orso v. United States*, 452 Fed. App'x 912 (11th Cir. 2012), the reviewing Court, after assuming arguendo that the Movant had raised a cognizable § 2255 claim, examined whether the movant had provided sufficient grounds to excuse his procedural default related to his collateral challenge to a career offender enhancement. The Court concluded that the Movant had failed to prove that he was actually innocent of the underlying conduct upon which the career enhancement was based, and that he therefore failed to demonstrate that a "fundamental miscarriage of justice" had occurred in the

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[16] It is for this same reason, as discussed *supra*., that the Movant's citation to cases where sentencing courts misapprehended certain underlying facts related to a defendant's convictions are not applicable here. The sentencing Court in this case did not sentence Mr. Beckles based upon factual inaccuracies, rather, Mr. Beckles challenges his sentence based upon a legal analysis. Again, Mr. Beckles does not contend here that the Court was mistaken about the fact that he was a felon in possession of a short-barreled shotgun.

application of the career offender enhancement to his sentence. The Court reached that opinion notwithstanding the fact that the Eleventh Circuit had, subsequent to the movant's sentencing, held that the underlying conduct, fleeing or attempting to elude the police, was not a "violent felony" for purposes of supporting the imposition of the career offender enhancement. Thus, the Court concluded that the change in the law regarding what constituted a violent felony for purposes of a career criminal enhancement was insufficient, absent a claim of actual innocence, to provide a basis for excusing a procedurally defaulted claim under § 2255.[17]

In a further attempt to demonstrate that the sentencing guideline error raised by Mr. Beckles is cognizable on a § 2255 motion and rises to a miscarriage of justice, the Movant, in his Supplemental Reply relies heavily on *Narvaez v. United States of America*, 674 F.3d 621 (7th Cir. 2011) and *Johnson v. United States*, 544 U.S. 295 (2005). In *Narvaez*, the defendant was convicted of an offense that normally would have resulted in a guideline range of between 100 and 125 months. *Narvaez*, 674 F.3d at 624. However, the district court found that the defendant was a career offender, which resulted in the defendant receiving a career offender enhancement that increased his guideline range to between 151 and 188 months. The Court sentenced the defendant under the then-mandatory guidelines to 170 months of incarceration. The defendant thereafter filed a motion for collateral relief pursuant to 28 U.S.C. § 2255, claiming that the Supreme Court's rulings in *Begay* and *Chambers v. United States*, 522 U.S. 122 (2009) had effected a subsequent change in law which rendered his sentence as a career offender improper

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[17] The Court in *Orso* again left open the question of whether a successful claim could be made on an initial § 2255 on this basis. However, the undersigned cites to *Orso* for its analysis of "actual innocence" for purposes of establishing whether a miscarriage of justice has occurred.

because the crimes that served as the basis for this enhancement were no longer crimes of violence.[18] The district court denied the defendant's § 2255 motion finding that the rulings in *Begay* and *Chambers* did not apply retroactively to cases on collateral review.

The Seventh Circuit Court of Appeals, however, reversed the district court and held that the subsequent case law did apply retroactively to the defendant's case. *Id.* at 625. The Court then noted that although sentencing errors are "generally not cognizable on collateral review," such errors are cognizable on collateral review when "a postconviction clarification in the law has rendered the sentencing court's decision unlawful." *Id.* at 627. The Court analogized Mr. Narvaez's case to *Davis v. United States*, 417 U.S. 333 (1974), in which the Supreme Court held that a subsequent interpretation of a statute which resulted in the defendant being convicted and punished "for an act that the law does not make criminal" was cognizable under 28 U.S.C. § 2255, and would constitute "a complete miscarriage of justice" if the defendant were not granted relief. *Id.* In so doing, the reviewing Court in *Narvaez* acknowledged that *Davis* provided for relief "when a defendant is innocent of the underlying crime," but the Court nevertheless concluded that the rationale applied in *Davis* was sufficiently analogous to Narvaez's claim that he did not qualify as a career criminal at the time of his sentence to entitle Mr. Narvaez to § 2255 relief. *Id.*

Further, the Court stated that the career offender enhancement, among other things, "created a legal presumption that [the Defendant] was to be treated differently

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[18] As mentioned above, *Begay v. United States*, 533 U.S. 137 (2008), narrowed the definition of what constituted a violent felony under the Armed Career Criminal Act. In *Chambers v. United States*, 522 U.S. 122 (2009), the Supreme Court analyzed the definition of "violent felony" under the Armed Career Criminal Act and concluded that a conviction for knowingly failing to report to a penal institution was not a violent felony under that statute.

from other offenders because he belonged in a special category reserved for the violent and incorrigible," and that "[s]peculation that the district court might today impose the same sentence is not enough to overcome the fact that, at the time of his initial sentencing, [the Defendant] was sentenced based upon the equivalent of a nonexistent offense." *Id.* The Court concluded by stating that while the Defendant "does not have an absolute right to a lower sentence," he "does have an absolute right not to stand before the court as a career offender when the law does not impose that label on him." *Id.*

However, *Narvaez* is distinguishable from the instant case for the following reasons. First, subsequent to the district court's determination in *Narvaez*, the United States Sentencing Guidelines have become advisory rather than mandatory. While this fact, standing alone, may not have altered the reviewing court's conclusion that the movant's sentence constituted a miscarriage of justice, it is significant that the Court in *Narvaez* referred to the then-mandatory nature of the Guidelines throughout the opinion. Indeed, the Court in *Narvaez* specifically stated, "Moreover, at the time of Mr. Narvaez's sentencing, the Guidelines were *mandatory*. The imposition of a career offender status therefore increased the sentencing range the district court was authorized to employ." See *United States v. Booker*, 543 U.S. 220, 234 (2005) ("Because [the Guidelines] are binding on judges, we have consistently held that the Guidelines have the force and effect of laws.")" *Id.* at 628-29.

In this case, unlike in *Narvaez*, the Court had the authority to depart from the advisory guidelines, either upward or downward. In this regard, it is worth noting that, at the sentencing hearing, the Court stated,

> When I look at the exhibits which have been introduced today, the certified copies of the prior convictions, what stands out is that the defendant was never appropriately punished for

> any of his prior felony convictions. You weren't simply given one pass, Mr. Beckles. You were given too many passes and, perhaps, that sent the wrong message to you.
>
> . . . .
>
> I am not persuaded, . to depart from the advisory Guideline range here and sentence you outside of the Guidelines.
>
> I have given careful consideration to the statutory factors contained in 18 U.S.C. §3553. I am mindful of the need to have this sentence reflect upon the seriousness of the offense, provide deterrence and safeguard the community from you, Mr. Beckles, because you have shown that you cannot live within the law.

(Cr. DE # 75: October 17, 2007 Sentencing Tr. at 41-43). Thus, the Court recognized that it had the authority to impose a sentence that it felt was appropriate notwithstanding the guideline range.[19]

In addition, in order to extend the Court's reasoning in *Narvaez* to the instant matter, this Court would have to equate the magnitude of a misapplication of an advisory guideline to that of a conviction and sentencing of a defendant for conduct which does

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[19] In *Narvaez*, the movant sought to have his sentence vacated where the trial court relied upon two prior state convictions to apply the career offender enhancement to his sentence, where it had been later determined that the prior state convictions did not constitute crimes of violence as contemplated by the career offender statute. The case at bar is distinguishable from those cases where an enhancement predicated upon a state conviction is found to be cognizable on a § 2255 motion to vacate because the state conviction has been vacated. In such cases, the Eleventh Circuit has made clear that a movant may challenge that enhancement. *United States v. Walker*, 198 F. 3d 811 (11th Cir. 2000); *Stewart v. United States*, 646 F. 3d 856 (11th Cir. 2011). *See, e.g., Bazemore v. United States*, No. CV411-259, 2012 WL 3552702, at *1 (S.D. Ga. Aug. 15, 2012) (finding that § 2255 movant was entitled to relief where prior state sentences, upon which federal enhancements were predicated, were vacated.) The Eleventh Circuit has made no such determination in cases where the defendant only seeks to challenge the application of a guideline enhancement to his sentence without more. Such a distinction is of particular significance under the facts of this case, where the Movant is currently serving a sentence which falls within the purported "correct" guideline range.

not constitute a crime.[29] As discussed above, the Eleventh Circuit has held that a conviction and sentencing for behavior that is no longer criminal is not analogous to the situation where a movant challenges his innocence to a guideline enhancement. *See McKay v. United States*, 657 F.3d 1190, 1199 (11th Cir. 2011). Thus, the undersigned concludes that the *Narvaez* case, which is not binding on this Court, is distinguishable from the instant case; and, more significantly concludes that based upon the relevant Eleventh Circuit case law, *Narvaez* likely would be decided differently in this Circuit.

Instead, the undersigned concludes that, as opposed to *Narvaez*, the law in the Eleventh Circuit is consistent with the en banc decision of the Eighth Circuit Court of Appeals in *Sun Bear v. United States*, 644 F.3d 700 (8th Cir. 2011) (en banc). In *Sun Bear*, the defendant pled guilty to a crime that ordinarily would have resulted in a guideline range of between 292 and 365 months. However, the Court found that the defendant was a career offender, which resulted in the defendant receiving an enhancement that increased his guideline range to between 360 months and life. *Id.* at 702. The defendant was sentenced under the then-mandatory guidelines to 360 months of incarceration. *Id.* After several cases limited the definition of a "crime of violence" for purposes of the career offender enhancement, the defendant collaterally attacked his sentence pursuant to 28 U.S.C. § 2255, alleging that his status as a career offender was imposed in violation of the law. *Id.* The defendant's Motion was denied by the district court, but a panel of the

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[29] It bears noting that the undersigned disagrees with the Government's contention that the fact that Mr. Beckles is serving "only 33 months above the correct guideline range" demonstrates that this matter does not constitute a miscarriage of justice (DE # 8 at 12) . Rather, the undersigned agrees with Mr. Beckles' contention that, as suggested in *Glover v. United States*, 531 U.S. 198 (2001), any additional amount of actual jail time may be significant for purposes of establishing prejudice. However, because *Glover* involved a constitutional Sixth Amendment claim of ineffective assistance of counsel, *Glover* does not control resolution of this case.

Eighth Circuit reversed this decision, holding that the new cases applied retroactively to Movant Sun Bear, and concluding that the Movant could raise his claim under 28 U.S.C. § 2255 because his case "[was] based on a postconviction change in the law that renders unlawful the district court's sentencing determination." *Sun Bear v. United States*, 611 F.3d 925, 930 (8th Cir. 2010). The panel of the Eighth Circuit opined "[t]here can be no room for doubt that such a circumstance inherently results in a miscarriage of justice and presents exceptional circumstances that justify collateral relief under § 2255." *Id.*

Upon rehearing en banc, however, the Eighth Circuit reversed the decision of the panel, stating that the defendant's "collateral attack on an application of the career offender guidelines is not cognizable under 28 U.S.C. § 2255." *Id.* at 704. In reaching this conclusion, the Court reiterated that § 2255 challenges to the misapplication of the guidelines are only cognizable when they constitute a miscarriage of justice. The en banc Court opined that a sentence is not unlawful unless it is in excess of the statutory maximum and observed that the defendant's sentence in that case was within the statutory maximum. In addition, the en banc Court concluded that because the defendant was sentenced within the guideline range the defendant would have received had he not received a career offender enhancement, there was no miscarriage of justice. *Sun Bear*, 644 F.3d at 705.[21]

The *en banc* Court also distinguished *Davis v. United States*, 417 U.S. 333, 346 (1974), stating that the subsequent Supreme Court case of *United States v. Addonizio*, 442 U.S. 178, 186-87 (1979), interpreted *Davis* as stating that it would be a miscarriage of

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[21] The initial guideline range in *Sun Bear* was between 292 and 365 months, as opposed to the career offender guideline range of between 360 months and life. The defendant had received a sentence of 360 months.

justice if a subsequent change in the law made the conduct for which a defendant was convicted and sentenced lawful, but the defendant in *Sun Bear* was convicted and sentenced for conduct that was still unlawful. *Id.* Thus the Eighth Circuit's rationale in distinguishing *Sun Bear* from *Davis* is akin to the distinction of actual innocence discussed above made by the Eleventh Circuit in *Gilbert* and *McKay*, as discussed above, and is applicable to this case. The Movant in this case, unlike the defendant in *Davis*, does not contend that he is actually innocent of being a felon in possession of a shotgun, and his actions for which he was convicted and sentenced remain illegal to this day. Accordingly, both *Sun Bear* and the case at bar are distinguishable from the situation in *Davis* that the Supreme Court concluded rose to the level of a miscarriage of justice.

Further, the Movant's reliance on *Johnson v. United States*, 544 U.S. 298 (2005) is misplaced. In *Johnson*, the Supreme Court evaluated whether the one-year statute of limitation applied to § 2255 actions was re-triggered once a state court had vacated one of the state convictions, that had been used to enhance the movant's federal sentence. In so doing, the Court in *Johnson* summarized the Supreme Court holdings in *Custis v. United States*, 511 U.S. 485 (1994) and *Daniels v. United States*, 532 U.S. 374 (2001) which made clear that certain enhanced federal sentences may be challenged when a prior state conviction supporting those enhancements has been vacated. Those cases, however, go no further than that and the undersigned is unaware of any Eleventh Circuit case that has extended those cases to a situation analogous to the sentencing guideline error presented in this case.[22] This case does not involve a vacated conviction, either state or

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[22] The other cases cited to by the Movant regarding the availability of collateral relief in cases where a state court conviction upon which an enhancement was predicated was vacated similarly provide no additional guidance with respect to the factual scenario presented in this case.

federal. Rather, the Movant only presents an argument that the sentencing court was incorrect in the way that it interpreted and applied the career offender enhancement under the guidelines.

Finally, the undersigned notes that although the Movant downplays the importance of finality as part of the calculus in determining cognizability, finality is an important concern. In the posture of this case, the Government did not challenge the existence of an error, and the reasonable probability of a lower sentence in the absence of this error; however, the issue of cognizability applies across the board to all sentencing guidelines determinations. *See Parks v. United States*, 832 F. 2d 1244, 1246 (11th Cir. 1987) (noting that societal interests in the finality of judgment and efficiency of judicial process required that the scope of collateral attacks be more limited than direct appeals). To permit a challenge under § 2255 where the sentence imposed falls within both the statutory maximum and the correct sentencing guidelines range, would impermissibly denigrate the finality of numerous sentencing decisions made in every case. To underscore this point, there is no claim in this case that the sentence imposed exceeded the correct guideline range.

Simply put, although this case presents a close call, the undersigned concludes that Mr. Beckles' current sentence, which is well within the statutory maximum and within the guideline range that Mr. Beckles would have received had the career offender guideline not been applied to his sentence, does not constitute a miscarriage of justice. As such, Mr. Beckles has failed to demonstrate that his sentence constitutes a fundamental miscarriage of justice that warrants relief pursuant to § 2255.

VII. CERTIFICATE OF APPEALABILITY

Section 2255 Rule 11(a) provides that "[t]he district court must issue or deny a

certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." 28 U.S.C. § 2255, Rule 11(a). A timely notice of appeal must be filed even if the court issues a certificate of appealability. 28 U.S.C. § 2255, Rule 11(b).

Since this case is a close call, and the Eleventh Circuit has not expressly decided whether a Sentencing Guidelines error that results in an increased sentence is cognizable pursuant to § 2255, and there is a reasonable probability that the Movant would have received a lower sentence in the absence of the career offender enhancement, the undersigned concludes that it is appropriate for the District Court to issue a Certificate of Appealability if this Report and Recommendation is adopted. This conclusion is supported by the dissenting opinions in the analogous cases of *Rozier v. United States*, No. 11-13557, ___ F.3d ___, 2012 WL 5870123 (11th Cir. Nov. 21, 2012), and *Gilbert*, which were decided on other grounds, as well as the decision of the Seventh Circuit Court of Appeals in *Narvaez*, and the fact that the Eleventh Circuit expressly noted in *Gilbert* that it did not decide whether the claim presented in this case would be cognizable on a first time § 2255 motion. Moreover, the Eleventh Circuit has previously issued a Certificate of Appealability on the issue of whether a career offender enhancement challenge is cognizable in proceedings under § 2255. *McKay v. United States*, 657 F.3d 1190 (11th Cir. 2011).

If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the District Judge in objections to this report.

VIII. CONCLUSION

Based upon the foregoing, the undersigned respectfully

RECOMMENDS that the Motion to Vacate sentence pursuant to 28 U.S.C. § 2255 be **DENIED,** and that a Certificate of Appealability be issued, as set forth above.

The parties will have 14 days from the date of this Report and Recommendation within which to file written objections, if any, for consideration by the Honorable Cecilia M. Altonaga, United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal any factual findings contained herein. *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988); *Resolution Trust Corp. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

DONE AND SUBMITTED in chambers at Miami, Florida on December 17, 2012.

Andrea M. Simonton

ANDREA M. SIMONTON
UNITED STATES MAGISTRATE JUDGE

Copies provided to:

The Honorable Cecilia M. Altonaga,
United States District Judge

All counsel of record

A - 8

UNITED STATES of America,
Plaintiff-Appellee,

v.

Travis BECKLES, Defendant-Appellant.

No. 07-15062.

United States Court of Appeals,
Eleventh Circuit.

April 17, 2009.

Background: Defendant was convicted of being convicted felon in possession of firearm by the United States District Court for the Southern District of Florida, No. 07-20805-CR-CMA, Cecilia M. Altonaga, J., 2007 WL 2155647, and he appealed.

Holdings: The Court of Appeals, Marcus, Circuit Judge, held that:

(1) defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights, so that district court did not err in denying defendant's motion to suppress his incriminating post-arrest statements;

(2) finding that defendant knowingly possessed the firearm recovered from apartment where he lived with his girlfriend was sufficiently supported by evidence;

(3) district court did not err, let alone plainly error, in relying on the presentence investigation report's (PSI's) characterization of firearm that defendant was convicted of possessing as "sawed-off shotgun" in treating his current offense as "crime of violence," for purpose of enhancing his sentence; and

(4) sentence of 360-months imprisonment imposed on armed career criminal convicted of unlawfully possessing sawed-off shotgun was not unreasonable.

Affirmed.

1. Criminal Law ⇐1139, 1158.12

Motion to suppress presents mixed questions of law and fact, and on appeal from district court's ruling thereon, the Court of Appeals reviews district court's findings of fact for clear error and its application of the law to those facts *de novo*.

2. Criminal Law ⇐1144.12

On appeal from district court's ruling on motion to suppress, the Court of Appeals construes all facts in favor of prevailing party.

3. Criminal Law ⇐412.2(5)

Defendant may waive his right against self-incrimination, and make statement, only if he does so voluntarily, knowingly and intelligently. U.S.C.A. Const.Amend. 5.

4. Criminal Law ⇐412.2(5)

Defendant's waiver of his *Miranda* rights is "voluntary, knowing and intelligent" if it was product of free and deliberate choice, rather than of intimidation, coercion or deception, and if it was made with full awareness of both nature of rights being abandoned and consequences of decision to abandon them. U.S.C.A. Const.Amends. 5, 6.

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law ⇐412.2(5)

Written waiver of defendant's *Miranda* rights is usually strong proof of validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. U.S.C.A. Const.Amends. 5, 6.

6. Criminal Law ⇐412.2(5)

Defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights, so that district court did not err in denying

defendant's motion to suppress his incriminating post-arrest statements, where, based on testimony of arresting officer, testimony that district court had determined was more credible than defendant's contrary testimony, defendant was read his *Miranda* rights, indicated in writing that he understood those rights and was aware of what he would give up if he chose to speak, indicated in writing that he was not under the influence of drugs or alcohol, did not appear to be under influence of drugs or alcohol, indicated in writing that he could understand English, appeared to actually understand English, and did not request an attorney or indicate that he did not wish to speak with law enforcement officers. U.S.C.A. Const.Amends. 5, 6.

7. Criminal Law ⇐1139, 1144.13(3, 5)

Court of Appeals reviews *de novo* whether there is sufficient evidence in record to support jury's verdict in criminal trial, viewing evidence in light most favorable to government, and drawing all reasonable factual inferences in favor of jury's verdict.

8. Criminal Law ⇐1159.2(7)

Evidence is sufficient to support conviction if reasonable trier of fact could find that the evidence established guilt beyond reasonable doubt.

9. Criminal Law ⇐1159.2(7, 8)

On challenge to sufficiency of evidence to support his conviction, it is not enough for defendant to put forth a reasonable hypothesis of innocence; issue is not whether jury reasonably could have acquitted, but whether it reasonably could have found guilt beyond reasonable doubt.

10. Weapons ⇐4

To establish violation of statute prohibiting convicted felons from being in possession of firearm, government must prove three elements: (1) that defendant was a convicted felon; (2) that defendant was in knowing possession of firearm; and (3) that this firearm was in or affecting interstate commerce. 18 U.S.C.A. § 922(g)(1).

11. Weapons ⇐4

In prosecution of defendant for being felon in possession of firearm, government did not need to prove actual possession, but needed to show only constructive possession through direct or circumstantial evidence. 18 U.S.C.A. § 922(g)(1).

12. Weapons ⇐4

"Constructive possession" exists, of kind sufficient to support conviction for possessory offense, when defendant exercises ownership, dominion or control over item or has power and intent to exercise dominion or control.

See publication Words and Phrases for other judicial constructions and definitions.

13. Weapons ⇐4

Defendant's mere presence in area of object or awareness of its location is not sufficient to establish "possession," of kind required to support his conviction of possessory offense.

See publication Words and Phrases for other judicial constructions and definitions.

14. Weapons ⇐17(4)

Finding that defendant knowingly possessed the firearm recovered from apartment where he lived with his girlfriend was sufficiently supported by evidence presented in firearms prosecution, including fact that defendant knew where firearm was concealed and informed officer of its exact location, apologized to girlfriend for bringing firearm into apartment, and admitted that he had stolen firearm in order to protect himself while dealing drugs. 18 U.S.C.A. § 922(g)(1).

15. Criminal Law ⇐1042.3(1)

Any mistake by district court in treating defendant's current possessory firearms offense as "crime of violence," of kind that supported enhancement of his sentence, based on fact that the firearm possessed was characterized as "sawed-off shotgun" in presentence investigation report (PSI), was reviewable only for plain error, where defendant never objected either to the PSI's characterization of firearm as "sawed-off shotgun" or to district court's treatment of his current offense as "crime of violence." 28 U.S.C.A. § 5845(a); U.S.S.G. §§ 4B1.1(a), 4B1.4(b), 18 U.S.C.A.

16. Criminal Law ⇐1030(1)

To demonstrate plain error, defendant bears burden of establishing that: (1) there was error; (2) which was plain or obvious; (3) which affected his substantial rights in that it was prejudicial and not harmless; and (4) which seriously affected fairness, integrity or public reputation of judicial proceedings.

17. Criminal Law ⇐1030(1)

Court of Appeals exercises "plain error" review sparingly and only in those circumstances in which miscarriage of justice would otherwise result.

18. Sentencing and Punishment ⇐299, 1237

District court did not err, let alone plainly error, in relying on the presentence investigation report's (PSI's) characterization of firearm that defendant was convicted of possessing as "sawed-off shotgun" in treating his current offense as "crime of violence," for purpose of enhancing his sentence under Sentencing Guideline, where defendant, despite making six objections to PSI, never once objected to its characterization of firearm recovered from his and his girlfriend's apartment. 26 U.S.C.A. § 5845(a); U.S.S.G. §§ 4B1.1(a), 4B1.4(b), 18 U.S.C.A.

19. Sentencing and Punishment ⇐1237

To determine whether defendant's firearm possession offense was "crime of violence," for purposes of enhancing his sentence based on his violent criminal history, district court could look outside the offense of conviction to the conduct surrounding that conviction, if ambiguities in judgment made the "crime of violence" determination impossible from face of judgment itself. U.S.S.G. §§ 4B1.1(a), 4B1.4(b), 18 U.S.C.A.

20. Sentencing and Punishment ⇐1244

To determine whether defendant's instant offense was "crime of violence," for purposes of enhancing his sentence based on his violent criminal history, district court, in attempt to resolve ambiguity in judgment of conviction, could rely on charging document, written plea agreement, transcript of plea colloquy, and any explicit factual findings to which defendant had assented, including undisputed statements found in presentence investigation report (PSI).

21. Sentencing and Punishment ⇐299

Facts contained in presentence investigation report (PSI) are undisputed and deemed to have been admitted, unless party objects to them before the sentencing court with specificity and clarity.

22. Sentencing and Punishment ⇐299

Failure to object to allegations of fact in presentence investigation report (PSI) admits those facts for sentencing purposes, and precludes argument that there was error in them.

23. Criminal Law ⇐1042.3(1)

Even assuming that district court, in treating defendant's current offense as "crime of violence," committed error that

was plain or obvious based on its reliance on presentence investigation report's (PSI's) characterization of firearm that defendant was convicted of possessing as "sawed-off shotgun," error was not shown to have affected defendant's substantial rights, and could not be corrected on plain error review, given complete lack of evidence that firearm that defendant possessed was not sawed-off shotgun. 26 U.S.C.A. § 5845(a); U.S.S.G. §§ 4B1.1(a), 4B1.4(b), 18 U.S.C.A.

24. Criminal Law ⇐1030(1)

Third, or "prejudice," prong of "plain error" test almost always requires that the error must have affected outcome of district court proceedings, and standard for showing that outcome was affected is the familiar "reasonable probability of a different result" formulation, which is a probability sufficient to undermine confidence in outcome.

See publication Words and Phrases for other judicial constructions and definitions.

25. Criminal Law ⇐1141(2)

It is defendant who bears burden of persuasion with respect to third, or "prejudice," prong of "plain error" test.

26. Criminal Law ⇐1030(1)

Defendant fails to satisfy the third, or "prejudice," prong of "plain error" test if it is equally plausible that error worked in favor of defense, or if effect of error is uncertain, such that appellate court does not know which, if either, side it helped.

27. Criminal Law ⇐1158.2

Reviewing a sentence for reasonableness merely asks whether the district court abused its discretion.

28. Criminal Law ⇐1134.75, 1134.77

On challenge to reasonableness of sentence imposed, the Court of Appeals engages in two-step process, under which it first determines whether district court committed any significant procedural error, such as failing to calculate, or improperly calculating, the Guidelines range, and then, if there was no procedural error, considers substantive reasonableness of sentence imposed under abuse-of-discretion standard, based on totality of circumstances.

29. Criminal Law ⇐1141(2)

Party who challenges sentence bears burden of establishing that sentence is unreasonable in light of both the record and statutory sentencing factors. 18 U.S.C.A. § 3553(a).

30. Sentencing and Punishment ⇐373

District court need only acknowledge that it considered the statutory sentencing factors, and need not discuss each of those factors either at sentencing hearing or in sentencing order. 18 U.S.C.A. § 3553(a).

31. Sentencing and Punishment ⇐1424

Sentence of 360-months imprisonment imposed on armed career criminal convicted of unlawfully possessing sawed-off shotgun was not unreasonable, though district court allegedly failed to adequately consider statutory sentencing factors and mitigating factors such as defendant's troubled childhood and drug addiction, where district court explicitly stated that it had given careful consideration to statutory factors, and that sentence imposed was needed to account for serious nature of offense and need to provide deterrence and to safeguard the community. 18 U.S.C.A. § 3553(a).

32. Sentencing and Punishment ⇐1385, 1390(2)

Government did not need not prove beyond a reasonable doubt that defendant had prior violent felony or serious narcotics convictions, or allege those prior con-

victions in indictment, in order to rely thereon in sentencing defendant as armed career criminal. 18 U.S.C.A. § 924(e).

Margaret Y. Foldes, Michael David Spivack, Asst. Fed. Pub. Defenders, Kathleen M. Williams, Fed. Pub. Def., Miami, FL, for Beckles.

Kathleen M. Salyer, Anne R. Schultz, Kelly S. Karase, Miami, FL, for U.S.

Appeal from the United States District Court for the Southern District of Florida.

Before BIRCH and MARCUS, Circuit Judges, and FORRESTER,* District Judge.

MARCUS, Circuit Judge:

Travis Beckles appeals from his conviction and sentence for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g). He claims that his conviction should be overturned both because the district court erred in denying his motion to suppress his post-arrest statements, and because the evidence was insufficient to permit a reasonable jury to find beyond a reasonable doubt that he knowingly possessed a firearm. Finally, Beckles argues that his sentence should be reversed because: (1) the district court plainly erred in sentencing him as a career offender under § 4B1.1 of the United States Sentencing Guidelines; (2) the sentence was unreasonable; and (3) the sentence violated the Fifth and Sixth Amendments to the United States Constitution since facts about his prior convictions were not found by the jury or charged in the indictment. After thorough review, we affirm both the conviction and the sentence.

I.

On April 24, 2007, Beckles was indicted by a federal grand jury in the United States District Court for the Southern District of Florida for possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g) and 924(e). Shortly thereafter, he moved to suppress all of the post-arrest statements he made to the Federal Bureau of Investigation ("FBI"), arguing that they were obtained in violation of his Fifth Amendment right to remain silent, due process, and *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

A. *The Suppression Hearing*

After conducting an evidentiary hearing on the motion to suppress, the magistrate judge determined that the defendant was fully advised of his *Miranda* rights, understood his rights, and voluntarily, knowingly and intelligently waived them before speaking to Special Agent John Jefferson of the FBI. During the evidentiary hearing, the government presented testimony from Special Agent Jefferson, who interviewed Beckles on the day of his arrest and was present when the defendant was read his *Miranda* rights. Jefferson testified that Beckles was not only read his *Miranda* rights but that Beckles also initialed each line of a written copy of those rights after they were read aloud to him to indicate his understanding. Beckles then signed the entire *Miranda* rights form.

Special Agent Jefferson added that Beckles signed a form indicating that he was not under the influence of alcohol or

* Honorable J. Owen Forrester, United States District Judge for the Northern District of Georgia, sitting by designation.

drugs and understood English. Jefferson also said that Beckles did not evince any difficulty in understanding the documents that were read to him, or that Beckles was under the influence of any drugs, alcohol, or medication. He testified that Beckles never requested an attorney during the interview nor gave any indication he wished an attorney to be present. Finally, Jefferson said that Beckles cooperated throughout the interview and even volunteered to assist the government as an informant.

Beckles also testified at the suppression hearing, giving an account at war with that of Special Agent Jefferson. Beckles claimed that he told Jefferson he wanted to consult with a lawyer and that he only initialed and signed the written copy of his *Miranda* rights because he was advised that he could not speak to a lawyer until the paper was signed. Beckles also testified that he did not tell the law enforcement officers he could read and write English, and signed the form indicating he could only because he was under the influence of marijuana. Beckles added that he did not understand what was going on during the interview, and explained that he had difficulty reading English but that he could understand spoken English.

The magistrate judge specifically credited Jefferson's account of his meeting with the defendant, finding that the defendant was fully afforded *Miranda* warnings orally and in writing, that the defendant understood his rights, and that the defendant knowingly and voluntarily answered the agent's questions. The district court adopted the magistrate judge's Report and Recommendation and denied the motion to suppress.

B. *The Trial*

Beckles was tried and convicted on all counts by a jury. The government adduced the following evidence. On April 11, 2007, while Miami Dade Detective Diego Castro was investigating a different case, he saw Beckles loitering in a public facility. When Castro, who was wearing a vest and shirt identifying himself as a police officer, exited his car, the defendant fled on foot. Castro followed Beckles, identified himself as a police officer, and instructed the defendant to stop running. Beckles fled to a nearby apartment. Castro heard screams from the apartment, and, after he knocked on the door, a woman, Tiovanni Jones, emerged and told Castro to remove Beckles (whom she claimed not to know) from her apartment. Castro took Beckles into custody and placed him in a police car.

After Beckles was secured, Detective Castro spoke to Jones, who this time said that Beckles was her boyfriend, that he lived in the apartment at least part-time, and that he helped her pay the rent. Jones also claimed that there was a gun in the bedroom that she wanted removed for the safety of her child. After obtaining her permission to search the bedroom, Castro was unable to locate the gun. Castro then asked Beckles where the firearm was located. The defendant told Castro that there was a gun under the bed, but Castro was still unable to find it. Castro then brought Beckles into the apartment and Beckles told him that there was a shotgun under the mattress. Castro recovered the shotgun.

The prosecution also presented the testimony of Jones, who said that she lived in the apartment with her six-year-old son and her sister and that Beckles was her part-time live-in boyfriend. Jones added that neither she nor her sister kept a firearm in the apartment.

Later that day, FBI agents returned to Jones's apartment and photographed clothing and other items belonging to Beckles, including a toothbrush, a watch,

and identification. Finally, the government offered at trial the testimony of Special Agent Jefferson, who said that, after being read his *Miranda* rights, Beckles acknowledged that he was a drug dealer associated with a street gang, that he acquired the shotgun for protection, and that he kept the firearm in the apartment where he lived.

The government presented two stipulations of fact: that the defendant had been convicted in May 2004 of a felony crime punishable by imprisonment for a term exceeding one year; and that the Browning shotgun recovered by Detective Castro on April 11, 2007 had traveled in commerce.

The defendant rested without presenting any additional witnesses.

C. *The Sentence*

The Presentence Investigation Report ("PSI") reported that the offense of conviction was subject to a 15-year minimum term of imprisonment and a maximum of life. According to the PSI, "Detective Castro ... recovered a sawed off Browning shotgun underneath the mattress" in the bedroom of Jones's apartment after Beckles told him that was where the gun was located. (PSI ¶ 6). It calculated his base offense level at 26, because an 18 U.S.C. § 922(g)(1) offense involves, among other things, a "firearm that is described in 26 U.S.C. § 5845(a)." (PSI ¶ 12). The PSI also found that Beckles is an armed career criminal subject to an enhanced sentence under 18 U.S.C. § 924(e) and the career offender provision contained in § 4B1.1 of the Sentencing Guidelines, because Beckles was 18 years old at the time of the instant offense, "the instant offense is a felony crime of violence (unlawful possession of a sawed-off shotgun)," and Beckles had two prior controlled substance felony convictions. (PSI ¶ 18). Thus, it calculated that Beckles had a total offense level of 37.

The PSI set forth Beckles's criminal history which included, in relevant part: (1) five convictions for possession with the intent to sell, manufacture, or deliver cocaine; (2) marijuana and cannabis possession offenses for which adjudication was withheld; and (3) a conviction for burglary of an unoccupied structure. Beckles's criminal history category was raised from V to VI, because he was a career offender under § 4B1.1. Based on a total offense level of 37 and a criminal history category of VI, the guidelines range was 360 months' to life imprisonment, including a mandatory minimum sentence of 15 years under 18 U.S.C. § 924(e)(1). The PSI also noted that Beckles was 24 years old; was abandoned by his parents at the age of five; described his childhood as "crazy"; began using drugs and having legal problems at a young age; and has a six-year-old son with a brain tumor who is undergoing chemotherapy. It also stated that the woman who raised Beckles said that he had a drug problem and could not read or write.

Beckles objected to the PSI, arguing that (1) the Sentencing Guidelines provided an excessive sentence; (2) police reports or other impermissible sources were used to calculate his criminal history category improperly; (3) the government did not prove the prior convictions required for the 18 U.S.C. § 924(e) enhancement; (4) none of his prior state drug convictions qualified as serious drug offenses under 18 U.S.C. § 924(e) and the government should have been required to charge his prior felonies in the indictment and prove them beyond a reasonable doubt; (5) the enhancement pursuant to § 4B1.1 was unconstitutional because it relied on facts pertaining to Beckles's prior convictions not alleged in the indictment or proven to

a jury beyond a reasonable doubt; and (6) applying the 18 U.S.C. § 924(e) enhancement was unconstitutional. Notably, Beckles did not object to the PSI's characterization of the firearm as a sawed-off shotgun or the enhancement of his offense level due to the classification of his current conviction as a felony crime of violence under § 4B1.1.

The district court conducted a sentencing hearing on October 17, 2007, during which the government put on a Miami-Dade Police Department fingerprint analyst to confirm that Beckles's fingerprints matched those on the certified Florida state court convictions ascribed to him for purposes of finding that his conduct fell within the career offender provision of the Sentencing Guidelines. The court concluded that the government had established the defendant's prior convictions and that the defendant qualified as an armed career criminal. The trial judge said the following:

> The defendant is considered a career offender because he was at least 18 at the time of this offense. This offense is a felony crime of violence, the unlawful possession of a sawed-off shotgun, and the defendant has at least two prior felony convictions of a controlled substance offense. The offense level, as noted in paragraph 18 of the presentence report, goes from an adjusted offense level of 26 up to 37 under the Sentencing Guideline § 4B1.1(b). So the defendant has started off today's sentencing hearing with an offense level of 37, a criminal history category of 6 and the Guidelines recommend a sentence of, at the low end, 360 months up to life.

The district court explained its sentence this way: "Beckles's long and continuous life of crime was never appropriately addressed at the State Court level. In other words . . the defendant has 18 arrests that resulted in convictions and/or juvenile adjudications" and he is only 24 years old. (*Id.* at 40–41). It concluded "[t]hat's a pretty extensive criminal history. It's pretty continuous . . . . [W]hat stands out is that the defendant was never appropriately punished for any of his prior felony convictions." (*Id.* at 41). The district court added that it had "given careful consideration to the statutory factors contained in 18 U.S.Code § 3553," and that it was "mindful of the need to have this sentence reflect upon the seriousness of the offense, provide deterrence and safeguard the community from you, Mr. Beckles, because you have shown that you cannot live within the law." (*Id.* at 43). A sentence of 360 months of imprisonment, five months of supervised release, and a $5,000 fine was imposed.

This timely appeal ensued.

II.

A. *Motion to Suppress*

[1, 2] First, Beckles argues that his conviction must be reversed because the incriminating post-arrest statements he made to Special Agent Jefferson should have been suppressed. In as much as a ruling on a motion to suppress is a mixed question of law and fact, we review the district court's findings of fact for clear error and the application of the law to those facts *de novo*. *United States v. Zapata*, 180 F.3d 1237, 1240 (11th Cir.1999). We construe all facts in favor of the prevailing party (here the government). *United States v. Bervaldi*, 226 F.3d 1256, 1262 (11th Cir.2000).

[3–5] Under the Fifth Amendment, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In *Miranda*, the Supreme Court held that the

government may not use statements stemming from the custodial interrogation of a criminal defendant unless the government demonstrates that it used procedural safeguards to ensure the privilege against self-incrimination remains intact. 384 U.S. at 444, 86 S.Ct. 1602. In particular, a defendant may waive his right against self-incrimination only if he does so "voluntarily, knowingly and intelligently." *Id.* A defendant's waiver of his *Miranda* rights is voluntary, knowing and intelligent if "it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it was "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). A written waiver "is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver." *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

[6] When the facts are construed in a light most favorable to the government, there can be little question that Beckles made a voluntary, knowing, and intelligent waiver of his *Miranda* rights. Special Agent Jefferson testified that Beckles: (1) was read his *Miranda* rights; (2) indicated in writing that he understood his *Miranda* rights and was aware of the rights that he would give up if he chose to speak; (3) indicated in writing that he was not under the influence of drugs or alcohol; (4) did not appear to be under the influence of drugs or alcohol; (5) indicated in writing that he could understand English; (6) appeared to understand English and spoke with Jefferson in English; and (7) did not request an attorney or indicate that he did not wish to speak with law enforcement officers.

While Beckles did provide contradictory testimony, the district court made a detailed credibility determination in favor of the FBI agent's version of the events, and this decision was not clearly erroneous. *See United States v. Delancy*, 502 F.3d 1297, 1306 (11th Cir.2007) (explaining that factual findings are not clearly erroneous where the district court makes detailed credibility determinations that it does not believe a witness's claim at a hearing on a motion to suppress). In particular, the magistrate judge, whose Report and Recommendation was adopted in full by the district court after a *de novo* review, explained that he chose to credit Special Agent Jefferson's account, and not Beckles's. In short, the district court did not err in denying Beckles's motion to suppress Beckles's incriminating post-arrest statements.

B. *Sufficiency of the Evidence*

Beckles also claims that his conviction must be reversed because it was supported by insufficient evidence. We remain unpersuaded.

[7–9] We review *de novo* whether there is sufficient evidence in the record to support a jury's verdict in a criminal trial, viewing the evidence in the light most favorable to the government, and drawing all reasonable factual inferences in favor of the jury's verdict. *United States v. Williams*, 144 F.3d 1397, 1401 (11th Cir. 1998). Accordingly, the evidence will be sufficient to support a conviction if "a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt." *United States v. Calhoon*, 97 F.3d 518, 523 (11th Cir.1996). In rebutting the government's evidence "[i]t is not enough for a defendant to put forth a reasonable hypothesis of innocence, because the issue is not whether a jury reasonably could have acquitted but whether

it reasonably could have found guilt beyond a reasonable doubt." *United States v. Thompson*, 473 F.3d 1137, 1142 (11th Cir.2006).

[10] To establish a violation of 18 U.S.C. § 922(g)(1), the government must prove three elements: "(1) that the defendant was a convicted felon, (2) that the defendant was in knowing possession of a firearm, and (3) that the firearm was in or affecting interstate commerce." *United States v. Delesenne*, 206 F.3d 1292, 1296–97 (11th Cir.2000). Beckles contests only the second element—that he did not knowingly possess a firearm.

[11–13] "The government need not prove actual possession in order to establish knowing possession; it need only show constructive possession through direct or circumstantial evidence." *United States v. Greer*, 440 F.3d 1267, 1271 (11th Cir.2006). "Constructive possession exists when the defendant exercises ownership, dominion, or control over the item or has the power and intent to exercise dominion or control." *Id.* However, "a defendant's mere presence in the area of [an object] or awareness of its location is not sufficient to establish possession." *United States v. Pedro*, 999 F.2d 497, 500–01 (11th Cir. 1993) (quotation marks omitted).

[14] Here, the evidence, viewed in the light most favorable to the jury's determination, amply supports the verdict. Among other things, the government established that: (1) Beckles was Jones's boyfriend and lived at her apartment; (2) Beckles helped pay the rent; (3) Beckles's belongings were kept at the apartment, including his clothing, his toothbrush, his watch, and his identification; (4) the Browning shotgun was recovered in Jones's apartment; (5) Beckles knew where the shotgun was concealed and told Detective Castro its exact location; (6) Beckles apologized to Jones for bringing the shotgun into the apartment; (7) the shotgun did not belong to Jones or any of the other occupants or guests at the apartment; and (8) Beckles said that he possessed the shotgun, and that he stole it to protect himself while dealing drugs. Thus, there was ample evidence to support the jury's finding that Beckles knowingly possessed the firearm. Indeed, most strikingly, Beckles admitted to Special Agent Jefferson that he had ownership and control over the shotgun and this testimony went uncontradicted at trial.

C. *Application of § 4B1.1 of the Sentencing Guidelines*

Beckles also says that his sentence must be reversed because, contrary to the finding of the district court, his conviction under 18 U.S.C. § 922(g) was not a "crime of violence" under § 4B1.1 of the Sentencing Guidelines. In particular, he claims that the district court erred by looking behind the face of his 18 U.S.C. § 922(g) conviction to make a finding that Beckles possessed a sawed-off shotgun within the meaning of 26 U.S.C. § 5845(a) and by increasing the Sentencing Guidelines calculation accordingly.

Due to multiple prior felonies, Beckles's violation of 18 U.S.C. § 922(g) subjected him to the enhanced penalty provision of 18 U.S.C. § 924(e)(1) and the district court found him to be an armed career criminal pursuant to that statute. This finding, in turn, qualified Beckles for a sentence enhancement under § 4B1.4. That provision of the Sentencing Guidelines instructs that the appropriate offense level is the greater of: (1) the applicable offense level from Chapters 2 and 3 of the Sentencing Guidelines; (2) the offense level described in § 4B1.1, if applicable; (3) level 34, if the firearm possessed was of a type described

in 26 U.S.C. § 5845(a); or (4) level 33. U.S.S.G. § 4B1.4(b).

Section 4B1.1, in turn, applies if:

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1(a). In particular, the Sentencing Guidelines specify that a "'[c]rime of violence' does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a)," and then reiterate that "[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence.'" U.S.S.G. § 4B1.2 Application Note 1.[1]

At sentencing, the district court found that § 4B1.1 was applicable and that it yielded the greatest offense level, reasoning that two of Beckles's prior felony convictions were for qualified controlled substances offenses, and the current 18 U.S.C. § 922(g) conviction was for a "crime of violence" because the firearm Beckles knowingly possessed was a sawed-off shotgun as defined in 26 U.S.C. § 5845(a).

On appeal, Beckles argues that § 4B1.1 does not apply to him because the instant conviction under 18 U.S.C. § 922(g) is not for a "crime of violence." Specifically, he suggests that he was convicted of unlawful possession of a firearm by a felon, not of unlawful possession of a 26 U.S.C. § 5845(a) firearm by a felon.

[15–17] Despite making six objections to the PSI (including one to the application of § 4B1.1) and five amendments to his sentencing memorandum, Beckles never objected to the PSI's characterization of the firearm as a sawed-off shotgun or to the PSI's or district court's enhancement of his offense level under § 4B1.1 because his current conviction was for a felony crime of violence. Accordingly, we review the district court's decision for plain error. *See e.g., United States v. Rond*, 406 F.3d 1322, 1323 (11th Cir.2005). To demonstrate plain error, Beckles has the burden of establishing that "(1) there is an error; (2) that is plain or obvious; (3) affecting [his] substantial rights in that it was prejudicial and not harmless; and (4) that seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *Id.* (quotation marks and citation omitted). We may exercise this review "sparingly and only in those circumstances in which a miscarriage of justice would otherwise result." *United States v. Rodrigues*, 398 F.3d 1291, 1298 (11th Cir.2005) (quotation marks and citation omitted). There can be little doubt this is a difficult and daunting hurdle for the appellant to cross, and Beckles has not done so today.

[18, 19] Indeed, Beckles has not established that there is any error, let alone that any such error is plain. To determine whether the instant offense is a "crime of violence" for purposes of enhancing a sentence under § 4B1.1, a district court may look outside of the "offense of conviction" to the conduct surrounding that conviction "if ambiguities in the judgment make the crime of violence determination impossible

1. The commentary and application notes of the Sentencing Guidelines are authoritative, unless they are plainly erroneous, inconsistent with the regulation they interpret, or contrary to the Constitution or federal law. *Stinson v. United States*, 508 U.S. 36, 45, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993); *United States v. Tornalba*, 339 F.3d 1238, 1242 (11th Cir.2003).

from the face of the judgment itself." *United States v. Spell*, 44 F.3d 936, 939–40 (11th Cir.1995); *United States v. Young*, 527 F.3d 1274, 1277 (11th Cir.2008) (same); *United States v. Owens*, 447 F.3d 1345, 1347 (11th Cir.2006) (same). Accordingly, we have permitted district courts to find additional facts when the crime for which the defendant was convicted encompasses both conduct that constitutes a crime of violence and conduct that does not constitute a crime of violence.[1] *See e.g., United States v. Aguilar-Ortiz*, 450 F.3d 1271, 1276 (11th Cir.2006) (finding prior state judgment of conviction ambiguous because the Court was unable to say as a categorical matter that all convictions under it qualified as a "drug trafficking offense" under § 2L1.2(b)(1)(B)); *Spell*, 44 F.3d at 939 (holding that a prior state judgment of conviction for burglary was ambiguous because it encompassed some conduct which constituted a crime of violence and some which did not); *see also Greer*, 440 F.3d at 1273 (noting that the defendant's prior convictions for making terrorist threats under a Georgia statute did "not, without more, prove that he has been convicted of a violent felony for ACCA purposes" because the state statute prohibits both violent and non-violent conduct); *see also United States v. Dwyer*, 245 F.3d 1168, 1171 (10th Cir.2001) ("If the statute is ambiguous, or broad enough to encompass both violent and nonviolent crimes, a court can look beyond the statute to certain records of the prior proceeding.") (quotation marks omitted).

Here, an ambiguity does exist. Plainly, a violation of 18 U.S.C. § 922(g)(1) encompasses both conduct that the Sentencing Guidelines explicitly says is not a crime of violence and conduct that the Sentencing Guidelines explicitly denominates as a crime of violence. All that is required to violate 18 U.S.C. § 922(g) is that a convicted felon knowingly possess any firearm. Thus, this conviction encompasses conduct involving the possession of a standard firearm as well as the possession of a firearm that specifically meets the criteria of 26 U.S.C. § 5845(a). The distinction between these two categories is important, because Congress and the Sentencing Commission have chosen to subject only those who possess 26 U.S.C. § 5845(a) firearms—which include, among other things, sawed-off shotguns that are less than 26 inches overall in length or have barrels that are less than 18 inches in length—to longer sentences, since those firearms "are inherently dangerous and when possessed unlawfully serve only violent purposes." U.S.S.G. Appx. C. Amend. 674 (2004).

[20] Where an ambiguity exists and the underlying conviction may be examined, the district court can rely on the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Aguilar-Ortiz*, 450 F.3d at 1276 (*quoting Shepard v. United States*, 544 U.S. 13, 16, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)). For purposes of sentencing, the district court also may base its factual findings on undisputed statements found in the PSI, because they are factual findings to which the defendant has assented. *See United States v. Bennett*, 472 F.3d 825, 832–34 (11th Cir.2006).

2. Although all of the prior cases in our Circuit discussing when a judgment of conviction is ambiguous for purposes of § 4B1.1 address prior convictions, as opposed to the instant conviction, that difference gives us no pause. The law that applies to evaluating prior convictions surely applies with equal force to the evaluation of the instant conviction, particularly because the Sentencing Guidelines contain the same definition of "crime of violence" for both prongs of § 4B1.1(a).

[21, 22] Facts contained in a PSI are undisputed and deemed to have been admitted unless a party objects to them before the sentencing court "with specificity and clarity." *Id.* at 822 (concluding that an objection to the probation officer's use of non-*Shepard* materials in preparation of the PSI did not amount to a dispute of the facts). "It is the law of this circuit that a failure to object to allegations of fact in a PSI admits those facts for sentencing purposes" and "precludes the argument that there was error in them." *United States v. Wade*, 458 F.3d 1273, 1277 (11th Cir. 2006); *Bennett*, 472 F.3d at 832 ("A sentencing court's findings of fact may be based on undisputed statements in the PSI. Where a defendant objects to the factual basis of his sentence, the government has the burden of establishing the disputed fact .... Otherwise, the objection is waived."). Indeed, the defendant's failure to object to conclusory statements in the PSI renders those statements undisputed and permits the sentencing court to rely upon them without error even if there is an absence of supporting evidence. *United States v. Hedges*, 175 F.3d 1312, 1315 (11th Cir.1999).

Beckles's PSI repeatedly stated that the firearm he was convicted of knowingly possessing was a *sawed-off shotgun*. First, the PSI specified that "Detective Castro then recovered a sawed off Browning shotgun" (PSI ¶ 6), and observed, in making its base offense level calculation, that the offense involved "a semi-automatic firearm that is capable of accepting a large capacity magazine; or ... [a] firearm that is described in 26 U.S.C. § 5845(a)." (PSI ¶ 12). In explaining the applicable Chapter Four enhancements, the PSI also stated that "[t]he defendant is considered a career offender because he was at least 18 years old at the time of the instant offense, the instant offense is a felony crime of violence (unlawful possession of a sawed-off shotgun)...." (PSI ¶ 18). The district court relied upon these undisputed facts found in the PSI and sentenced Beckles accordingly as a career offender under § 4B1.1. We can discern no error in the district court's reliance on these facts in the PSI to sentence Beckles for possession of a sawed-off shotgun.[3]

[23–26] But, even if Beckles had demonstrated error and that error was plain or obvious, his argument still could not succeed because he is unable to show that his substantial rights were affected by the error. The third prong of the plain error test "almost always requires that the error must have affected the outcome of the district court proceedings." *Rodriguez*, 398 F.3d at 1299 (quotation marks and citations omitted). "The standard for showing that is the familiar reasonable probability of a different result formulation, which means a probability sufficient to undermine confidence in the outcome." *Id.* (quotation marks and citations omitted). Thus, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). In that vein,

> if it is equally plausible that the error worked in favor of the defense, the defendant loses; if the effect of the error is uncertain so that we do not know which, if either, side it helped the defendant loses. Where errors could have cut either way and uncertainty exists, the burden is the decisive factor in the third

3. We note in passing that Beckles has not objected to the district court's finding that at least two of his prior state convictions were for controlled substance offenses that meet the requirements of § 4B1.1.

prong of the plain error test, and the burden is on the defendant.

Rodriguez, 398 F.3d at 1300.

Simply put, on the record before us, the effect of the alleged error is uncertain; therefore, Beckles would lose even if he could show obvious error. No evidence has been adduced regarding the length and size of the shotgun possessed by Beckles, and Beckles has submitted nothing showing that the firearm was not, in fact, a sawed-off shotgun under 26 U.S.C. § 5845(a). Indeed, his attorney said at oral argument that she was unaware of the actual length of the firearm, and that it had been destroyed by the United States Marshals Service pursuant to an unopposed forfeiture order issued on December 21, 2007. Because we do not know whether the firearm Beckles possessed would have qualified Beckles as a career offender, we could do nothing other than speculate. Where such speculation is required to resolve the dispute, the appellant has not met and cannot meet "his burden of showing a reasonable probability that the result would have been different but for the error; he has not met his burden of showing prejudice; he has not met his burden of showing that his substantial rights have been affected." *Rodriguez*, 398 F.3d at 1301.

D. *Reasonableness*

[27–29] Beckles also claims that his sentence should be reversed because it is an unreasonable one. Reviewing a sentence for reasonableness "merely asks whether the trial court abused its discretion." *United States v. Pugh*, 515 F.3d 1179, 1189 (11th Cir.2008) (*quoting Rita v. United States*, 551 U.S. 338, 127 S.Ct. 2456, 2465, 168 L.Ed.2d 203 (2007)). Our reasonableness review consists of two steps. *Id.* at 1190. First, we must

> ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.

Id. (*quoting Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586, 597, 169 L.Ed.2d 445 (2007)).[4] If the district court did not procedurally err, then we must consider the "substantive reasonableness of the sentence imposed under an abuse-of-discretion standard," based on the "totality of the circumstances." *Id.* (*quoting Gall*, 128 S.Ct. at 597). "The party who challenges the sentence bears the burden of establishing that the sentence is unreasonable in the light of both th[e] record and the factors in section 3553(a)." *United States v. Thomas*, 446 F.3d 1348, 1351 (11th Cir. 2006) (quotation marks omitted).

[30, 31] Beckles says his sentence is unreasonable because the district court failed to adequately consider the § 3553(a) factors and mitigating factors such as his troubled childhood, drug addiction, and ill child. But, at sentencing, the district court explicitly stated that it had "given

4. The § 3553(a) factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense; (3) the need for the sentence imposed to afford adequate deterrence; (4) the need to protect the public; (5) the need to provide the defendant with educational or vocational training or medical care; (6) the kinds of sentences available; (7) the Sentencing Guidelines range; (8) the pertinent policy statements of the Sentencing Commission; (9) the need to avoid unwanted sentencing disparities; and (10) the need to provide restitution to victims. 18 U.S.C. § 3553(a).

careful consideration to" the factors found in 18 U.S.C. § 3553(a), that Beckles had committed a serious offense, and that there was a need to provide deterrence and safeguard the community from him. The record thus reflects the district court's adequate consideration of the § 3553(a) factors. In fact, "the district court need only acknowledge that it considered the § 3553(a) factors, and need *not* discuss each of these factors in either the sentencing hearing or in the sentencing order." *United States v. Amedeo*, 487 F.3d 823, 833 (11th Cir.2007) (quotation marks and punctuation omitted); *United States v. Talley*, 431 F.3d 784, 786 (11th Cir.2005) (stating that "an acknowledgment by the district court that it has considered the defendant's arguments and the factors in section 3553(a) is sufficient under *Booker*"). Accordingly, Beckles's sentence cannot be reversed on this ground.

E. *Imposition of 18 U.S.C. § 924(e) sentence*

[32] Finally, Beckles argues that the district court violated the Fifth and Sixth Amendments to the United States Constitution when it applied 18 U.S.C. § 924(e), because the application of that provision—which instructs that district courts must impose a mandatory minimum sentence of 15 years upon anyone convicted of violating 18 U.S.C. § 922(g) who also has three previous violent felony or serious drug offense convictions committed on different occasions—was based upon facts about Beckles's prior convictions that were not found by the jury or charged in the indictment.

The Supreme Court has rejected Beckles's argument. In *Almendarez-Torres v. United States*, 523 U.S. 224, 247, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), the Court held that the government need not prove beyond a reasonable doubt that a defendant had prior convictions or allege those prior convictions in the indictment in order to use those convictions to enhance a defendant's sentence. This Court has confirmed repeatedly that *Almendarez-Torres* is good law and that "a district court does not err by relying on prior convictions to enhance a defendant's sentence." *United States v. Shelton*, 400 F.3d 1325, 1329 (11th Cir.2005); *see United States v. Dowd*, 451 F.3d 1244, 1258 (11th Cir.2006) (explaining that "we are bound by *Almendarez-Torres* until it is explicitly overruled by the Supreme Court"); *Greer*, 440 F.3d at 1273–76 (expressly rejecting the argument that a judge is forbidden by *Booker* and *Apprendi* from determining the factual nature of the prior conviction in vacating the district court's refusal to impose the 18 U.S.C. § 924(e) mandatory minimum sentence because the jury did not determine whether the defendant's three prior convictions were for violent felonies).

Accordingly, we AFFIRM the conviction and sentence in all respects.

AFFIRMED.

AMGEN, INC., Appellant,

v.

INTERNATIONAL TRADE COMMISSION, Appellee,

and

Roche Holding Ltd., F. Hoffmann-La Roche Ltd., Roche Diagnostics GmbH, and Hoffman-La Roche Inc., Intervenors.

No. 2007-1014.

United States Court of Appeals, Federal Circuit.

April 30, 2009.

Background: Patentee appealed from a decision of the International Trade Com-

RECORD AND BRIEFS

ORIGINAL

No. 15-8544

Supreme Court, U.S.
FILED
MAY 13 2016
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

TRAVIS BECKLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

In Johnson v. United States, 135 S. Ct. 2551 (2015), this Court held that the residual clause in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. In Welch v. United States, 136 S. Ct. 1257 (2016), the Court held that Johnson announced a new "substantive" rule of constitutional law that applies retroactively in an initial collateral challenge under 28 U.S.C. 2255 to a sentence enhanced under the ACCA. 136 S. Ct. 1268. The questions presented in this petition are:

1. Whether, in a vagueness challenge to the use of the residual clause in Sentencing Guidelines § 4B1.2(a)(2) to enhance an advisory guidelines range, Johnson's constitutional rule applies retroactively in a motion under Section 2255.

2. Whether Johnson's constitutional rule applies to the residual clause in Sentencing Guidelines § 4B1.2(a)(2).

3. Whether petitioner's conviction for unlawful possession of a sawed-off shotgun qualifies as a "crime of violence" under the commentary to Sentencing Guidelines § 4B1.2.

IN THE SUPREME COURT OF THE UNITED STATES

No. 15-8544

TRAVIS BECKLES, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-3) is not published in the Federal Reporter but is reprinted at 616 Fed. Appx. 415. A prior opinion of the court of appeals affirming the denial of petitioner's motion under 28 U.S.C. 2255 (Pet. App. A4, at 1-4) is not published in the Federal Reporter but is reprinted at 579 Fed. Appx. 833. A prior opinion of the court of appeals affirming petitioner's conviction and sentence on direct appeal (Pet. App. A8, at 1-15) is reported at 565 F.3d 832.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 2015. A petition for rehearing was denied on February 11, 2016 (Pet. App. A2). The petition for a writ of certiorari was filed on March 9, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2007, following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 360 months of imprisonment, to be followed by five years of supervised release The court of appeals affirmed, Pet. App. A8, at 8, and this Court denied a petition for writ of certiorari. 558 U S. 906 (2009). The district court subsequently reduced petitioner's sentence to 216 months of imprisonment after the government filed a motion under Federal Rule of Criminal Procedure 35(b). D. Ct. Doc. 150 (Jun. 23, 2010). In 2010, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255(a). D. Ct. Doc 151 (Mar. 4, 2013). The district court denied the motion but issued a certificate of appealability. Pet. App. A5, at 1-2. The court of appeals affirmed Pet App A4, at 1-4 Petitioner filed a petition for a writ of certiorari, and this Court granted the

petition, vacated the judgment, and remanded to the court of appeals for further consideration in light of Johnson v. United States, 135 S. Ct. 2551 (2015). 135 S. Ct. 2928. On remand, the court of appeals again affirmed the denial of petitioner's Section 2255 motion. Pet. App. A1, at 1-3.

1. a. On April 11, 2007, Police Detective Diego Castro was patrolling an area of Miami when he saw petitioner loitering in a public housing facility. Castro, who was wearing a vest and shirt identifying him as a police officer, got out of his police car, and petitioner fled on foot. Castro followed petitioner, identified himself as a police officer, and told petitioner to stop running. Petitioner ran into a nearby apartment. Castro heard screams coming from the apartment and knocked on the door. Tiovanni Jones answered and asked Castro to remove petitioner, whom she claimed not to know. Castro took petitioner into custody and placed him in the police car. Pet. App. A8, at 6; 07-15062 Gov't C.A. Br 3-4; Presentence Investigation Report (PSR) ¶¶ 4-5.

Castro then spoke to Jones, who said that petitioner was her boyfriend and sometimes lived at the apartment. Jones said that there was a gun in the bedroom and consented to a search of the apartment. After searching for the gun unsuccessfully, Castro asked petitioner where the gun was located. Petitioner said that there was a shotgun under the mattress. Castro

recovered a sawed-off Browning shotgun from under the mattress. Petitioner later admitted that he was a drug dealer and had acquired the shotgun for protection. Pet. App. A8, at 6-7; 07-15062 Gov't C.A. Br. 4-5; PSR ¶¶ 6-8.

A federal grand jury in the Southern District of Florida returned an indictment charging petitioner with possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1) Pet. App. A8, at 5. A jury convicted petitioner of the felon-in-possession charge. Id. at 8.

b. A conviction for violating Section 922(g)(1) ordinarily exposes the offender to a statutory maximum sentence of ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has at least three prior convictions for a "violent felony" or a "serious drug offense," the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), requires a minimum sentence of at least 15 years of imprisonment and permits a maximum sentence of life imprisonment. See Custis v. United States, 511 U.S. 485, 487 (1994). The definition of "violent felony" in the ACCA includes a residual clause covering offenses that "involve[] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii).

The Probation Office concluded that petitioner was an armed career criminal because his criminal history included at least three qualifying convictions for "serious drug offense[s] " 18

U.S.C. 924(e); see PSR ¶¶ 18, 24, 30, 33, 35, 38. The Probation Office also determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1. PSR ¶¶ 18, 41. Under Section 4B1.1, a defendant is subject to enhanced punishment as a "career offender" when (a) he was at least 18 years old at the time of the offense of conviction; (b) the offense of conviction is a felony that is a "crime of violence" or a "controlled substance offense"; and (c) he has at least two prior felony convictions for a "crime of violence" or a "controlled substance offense." Guidelines § 4B1.1(a). The phrase "crime of violence" is defined in Guidelines § 4B1.2(a) to include a felony offense that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another," or (2) "is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Ibid. The commentary to Section 4B1.2 further identifies other crimes of violence, including "murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, * * * [and] extortionate extension of credit." Guidelines § 4B1.2 comment. (n.1). The commentary also states that "'[c]rime of violence' does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C.

§ 5845(a)," and that "[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a)(e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a crime of violence." Guidelines § 4B1.2 comment. (n.1) As a career offender, petitioner's total offense level was 37 and his criminal history category was VI, resulting in an advisory Guidelines range of 360 months to life imprisonment.[1] PSR ¶ 79.

At sentencing, the district court found that the government had "amply established" the prior convictions that subjected petitioner to sentencing under the ACCA. 10/17/07 Tr. 40. The court also ruled that petitioner qualified as a career offender, finding that petitioner's unlawful possession of a sawed-off shotgun was a "felony crime of violence" and that petitioner had "at least two prior felony convictions of a controlled substance offense." Ibid. The court sentenced petitioner to 360 months of imprisonment, to be followed by five years of supervised release. Id. at 43.

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[1] Absent the career offender designation, petitioner's offense level would have been 26 and his criminal history category would have been V. PSR ¶¶ 17, 41. An offense level of 26 and a criminal history category of V would normally produce a Guidelines range of 110 to 137 months of imprisonment, but because petitioner was subject to a 15-year mandatory minimum under the ACCA, his Guidelines sentence without the career offender enhancement would have been 180 months. See Guidelines § 5G1.1(b).

c. The court of appeals affirmed. Pet. App. A8, at 1-15. Among other things, petitioner challenged his designation as a career offender, arguing that the instant conviction did not qualify as a "crime of violence" because he was convicted only of unlawful possession of a firearm by a felon, not of unlawful possession of a firearm listed in 26 U.S.C. 5845(a). Pet. App. A8, at 10-11. Reviewing for plain error because petitioner failed to preserve the argument below, the court of appeals rejected petitioner's claim. Id. at 11-14. The court relied on the provision in the commentary to the career offender guideline that classifies possession of a sawed-off shotgun as a crime of violence, explaining that Guidelines commentary is "authoritative" unless it is "plainly erroneous," inconsistent with the guideline it interprets, or contrary to the Constitution or a federal statute. Id. at 11 n.1 (citing Stinson v. United States, 508 U.S. 36, 45 (1993)). The court noted that petitioner had not objected to statements in the PSR identifying the firearm he possessed as a sawed-off shotgun and found "no error" in the district court's reliance on these "undisputed facts." Id. at 13 This Court denied certiorari. 558 U.S. 906 (2009).

On June 22, 2010, the district court granted the government's motion under Federal Rule of Criminal Procedure

35(b) and reduced petitioner's sentence to 216 months. D. Ct Doc. 150.

2. a. In September 2010, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, arguing that he was incorrectly sentenced as a career offender because his conviction for unlawful possession of a sawed-off shotgun was not a "crime of violence" under Guidelines § 4B1.2. D. Ct. Doc. 151, at 5-10. Petitioner contended that the Eleventh Circuit's ruling in United States v. McGill, 618 F.3d 1273 (2010), that possession of a sawed-off shotgun was not a violent felony under the ACCA, required the same conclusion with respect to the career offender guideline and that the contrary provision in the guideline's commentary was therefore invalid. D. Ct. Doc. 151, at 6-10

The district court initially granted petitioner's Section 2255 motion and stated that it would schedule a resentencing hearing. Pet. App. A6, at 18. The government moved for reconsideration, D. Ct. Doc. 157 (May 30, 2013), citing the intervening decision in United States v. Hall, 714 F.3d 1270 (11th Cir. 2013), in which the court held that possession of an unregistered sawed-off shotgun qualifies as a crime of violence under the Guidelines. In Hall, the court noted that it would "traditionally employ" a "categorical approach" in determining "whether an offense qualifies as a 'crime of violence' under the

residual clause." Id. at 1273; see id. at 1273-1274 & n.3 (court would "only consider whether the prior conviction poses a serious potential risk of physical injury that is similar to the risk posed by one of the enumerated offenses"). Rather than applying that approach to the sawed-off shotgun offense, however, the court ruled that under Stinson, "the definition of 'crime of violence' provided by the Guidelines commentary" was "authoritative" and binding. Id. at 1274 ("the commentary provision violates neither the Constitution nor any * * * federal statute" and "is not inconsistent with, or a plainly erroneous reading of, the guideline text") The district court granted the reconsideration motion, denied petitioner's Section 2255 motion, and issued a certificate of appealability. Pet. App. A5.

b. The court of appeals affirmed in an unpublished per curiam opinion, stating that it was "bound by" its ruling in Hall. Pet. App. A4, at 2-4.

c. On December 2, 2014, petitioner filed a petition for a writ of certiorari arguing that his conviction for possession of a sawed-off shotgun did not qualify as a crime of violence under the residual clause in the career-offender guideline. See Pet. 10-11. On June 26, 2015, this Court held in Johnson that ACCA's residual clause is void for vagueness, and, therefore, imposing an increased sentence under ACCA's residual clause "violates the

Constitution's guarantee of due process." 135 S. Ct. 2928 (2015). On June 30, 2015, this Court granted petitioner's petition for a writ of certiorari, vacated the judgment, and remanded the case to the court of appeals for further consideration in light of Johnson. 135 S. Ct. at 2928; Pet. App. A3.

3. On remand, the court of appeals again affirmed the judgment of the district court denying petitioner's Section 2255 motion. Pet. App. A1 In an unpublished per curiam opinion, the court reiterated its earlier holding that unlawful possession of a sawed-off shotgun qualifies as a crime of violence under the commentary to Guidelines § 4B1.2. Pet. App. A1, at 2-3 (citing Hall, 714 F 3d at 1270). The court explained that this Court's ruling in Johnson "does not control this appeal" because petitioner's career-offender sentence was "based not on the ACCA's residual clause, but based on express language in the Sentencing Guidelines classifying [petitioner's] offense as a 'crime of violence,'" and Johnson "decided nothing about career-offender enhancements under the Sentencing Guidelines or about the Guidelines commentary underlying [petitioner's] status as a career offender." Id. at 3.

The court of appeals denied petitioner's petition for rehearing en banc, with no judge in regular active service calling for a vote on the petition. Pet. App. A2.

ARGUMENT

1. Petitioner first contends (Pet. 13-20) that this Court should grant review to decide whether, in a vagueness challenge to the use of the residual clause in Sentencing Guidelines § 4B1.2(a)(2) to enhance an advisory guidelines range, Johnson's constitutional rule applies retroactively in a motion under Section 2255. The court of appeals did not address that question, and resolution of the issue would not affect the outcome of this case To obtain relief, petitioner would have to prevail on the threshold question whether Johnson applies to the residual clause in the career offender guideline. He would also have to establish that the court of appeals erred in concluding that the decision in Johnson "d[id] not control" this case because petitioner's conviction for unlawful possession of a sawed-off shotgun qualified as a crime of violence based on the commentary to the career offender guideline. Pet. App. A1, at 3. And that dispositive question -- which concerns the proper application of the commentary to the current career offender guideline -- is not a question of continuing importance because the Sentencing Commission has amended the guideline to move the list of enumerated offenses from the commentary to the

text of the guideline. Accordingly, this Court's review is unwarranted.[2]

a. Petitioner's claim that Johnson applies retroactively in Guidelines cases lacks merit for the reasons set forth in the government's brief in opposition to the petition for a writ of certiorari in Jones v. United States, No. 15-8629. See U.S. Br. in Opp. at 9-26, Jones, supra. We have served petitioner with a copy of that brief.

b. No conflict in the circuits exists over whether Johnson is retroactive in an initial collateral motion under Section 2255 challenging application of the Guidelines' residual clause. Indeed, no court of appeals has yet resolved Johnson's retroactivity in the Guidelines context in an initial Section 2255 motion. The two published court of appeals decisions that have addressed the issue did so in the course of considering applications for authorization to file a second or successive Section 2255 motion. In In re Rivero, 797 F.3d 986 (11th Cir.

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[2] The questions presented in this case are also presented in the petition for a writ of certiorari in Jones v United States, No 15-8629 (Mar. 18, 2016). The question whether Johnson is retroactive (or whether it has been "made" retroactive to cases on collateral review within the meaning of 28 U.S.C. 2255(h)(2)) in cases involving sentences imposed based on the Guidelines' residual clause is presented in the petition for an original writ of habeas corpus in In re Rivero, No. 15-7776 (Jan. 14, 2016) The government filed its brief in opposition to that petition on April 1, 2016.

2015), petition for habeas pending, No. 15-7776 (filed Jan. 14, 2016), the Eleventh Circuit denied authorization to file a successive Section 2255 motion and held only that this Court had not "made" Johnson retroactive for purposes of the gatekeeping provision in 28 U.S.C. 2255(h)(2). 797 F.3d at 989-991; see Mays v. United States, No. 14-13477, 2016 WL 1211420, at *6 (11th Cir. Mar. 29, 2016) (explaining that Rivero resolved only the "narrow" question whether this "Court has explicitly, or by logical necessity, made [the] rule [in Johnson] retroactive"). In In re Encinias, No. 16-8038, 2016 WL 1719323, at *1-*2 (Apr. 29, 2016) (per curiam), the Tenth Circuit granted an application to file a second or successive Section 2255 motion challenging a career offender sentence based on Johnson. The court noted that the applicable "prima facie" standard required only a showing of "possible merit to warrant a further exploration * * * by the district court," and it concluded that the applicant had made a sufficient prima facie showing. Ibid. (citation omitted).

c. In any event, this case would not be an appropriate vehicle to decide the retroactivity question. Petitioner did not raise any claim concerning Johnson's retroactivity in Guidelines cases in the court of appeals, and that court did not discuss the question petitioner seeks to present here [3] This

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[3] The court of appeals issued its decision on remand from this Court without requiring additional briefing, but petitioner did not raise any issue concerning Johnson's retroactivity in

Court's "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted); see, e.g., Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970).

That practice is particularly appropriate here because resolution of the retroactivity question petitioner raises would have no effect on the outcome in this case. After this Court remanded the case for further consideration in light of Johnson, the court of appeals rejected petitioner's claim on the merits, holding that its prior decision in Hall "remains good law" after Johnson and that petitioner was therefore correctly classified as a career offender. Pet. App. A1, at 3; see id. at 2-3. Accordingly, a ruling by this Court that Johnson applies retroactively in Guidelines cases would not assist petitioner, absent review of that additional Guidelines classification issue, which does not merit further review. See pp. 18-20, infra.

Petitioner contends (Pet. 6, 13, 16-19) that a "prompt" ruling from this Court clarifying whether Johnson applies

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his petition for rehearing en banc See 13-13569 Pet for Reh'g at 1

retroactively in Guidelines cases would promote "judicial efficiency" because prisoners must file Section 2255 motions raising Johnson claims by June 26, 2016, to comply with the one-year statute of limitations set forth in 28 U.S.C. 2255(f). See Dodd v. United States, 545 U.S. 353, 357 (2005) (one-year statute of limitations applies to all Section 2255 motions, including successive motions, and it runs from the date of the decision announcing the new right, not a later decision making that right retroactive). Petitioner also notes (Pet. 17) that if the Court fails to resolve the retroactivity question this Term, prisoners who have previously filed a Section 2255 motion will be left with no avenue for relief other than filing an original habeas petition in this Court. But those considerations, without more, do not make it appropriate to grant review of a question that neither the court below nor any other court of appeals has resolved and that would not affect the judgment in this case

2. Petitioner also urges (Pet. 20-27) the Court to grant review to decide whether Johnson's holding that the ACCA's residual clause is void for vagueness applies to the residual clause in the career offender guideline. The government agrees with petitioner that Johnson's holding invalidating the ACCA's residual clause invalidates the identically worded residual clause in the career offender guideline, and the government

has advocated that position in post-Johnson Guidelines sentencing proceedings and in cases pending on direct review as of the date of Johnson's issuance. See, e.g., U.S. Supp. Br. at 3-10, in United States v. Madrid, 805 F.3d 1204 (10th Cir. 2015) (No. 14-2159); cf. Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final"). Petitioner also correctly notes (Pet. 21-22) that a conflict exists among the circuits on the question whether Johnson's holding applies to the Guidelines. Compare United States v. Pawlak, No. 15-3566 (6th Cir. May 13, 2016), slip op. at 5-13 (agreeing with the government that it does); Madrid, 805 F.3d at 1210-1211 (same), with United States v. Matchett, 802 F 3d 1185, 1193-1196 (11th Cir 2015) (disagreeing with the government), petition for reh'g en banc pending, No. 14-10396 (11th Cir. filed Oct. 13, 2015). Cf. United States v. Lee, No. 13-10517, 2016 WL 2638364, at *2 (9th Cir. May 6, 2016) (declining to reach the issue); id. at *10 (Ikuta, J., dissenting) (opining that "the Guidelines residual clause is not void for vagueness" under Johnson, but that the district court committed procedural error in applying that clause).

Despite the disagreement among the courts of appeals, this Court's review is not warranted. Whether Johnson applies to the career offender guideline's residual clause is a question of limited and diminishing prospective importance. The Sentencing Commission has adopted an amendment that deletes the residual clause from the guideline in light of "many of the same concerns cited by [this] Court in Johnson." 81 Fed. Reg. 4743 (Jan. 27, 2016). Absent congressional action, that amendment will take effect on August 1, 2016. Id. at 4741. The question of Johnson's application to the current career offender guideline is therefore likely to be of no continuing importance.

Furthermore, even if the question otherwise warranted review, this case would be a poor vehicle in which to consider it. The court of appeals did not resolve this case based upon an analysis of whether Johnson invalidated the career offender guideline's residual clause. Instead, the court held that Johnson did not affect petitioner's sentence, which was "based on express language in the Sentencing Guidelines classifying [his] offense as a 'crime of violence.'" Pet. App. A1, at 3. Petitioner reads (Pet 26-27) the court's statement that Johnson "decided nothing about career-offender enhancements under the Sentencing Guidelines" and its conclusion that its prior decision in Hall remained "good law" as signaling that the court "expressly limited Johnson to sentences imposed under the ACCA."

(citations omitted). But the court did not explicitly address that issue, nor did it cite the Eleventh Circuit's published decision in Matchett squarely holding that the "vagueness doctrine * * * does not apply to advisory guidelines." 802 F.3d at 1194.

Finally, this case is an inappropriate vehicle for review because even if Johnson invalidated the career offender guideline's residual clause, petitioner would not be entitled to relief unless he also prevailed on his claim that his conviction did not qualify as a crime of violence under the commentary to the guideline. As explained below, that claim lacks merit and in any event is of no prospective importance, given the proposed amendment to the career offender guideline.

3. Petitioner contends (Pet. 28-34) that this Court should grant certiorari to decide whether possession of a sawed-off shotgun is a crime of violence under Guidelines § 4B1.2 because it is listed as a "crime of violence" in the commentary to the guideline and, more broadly, whether the commentary has "freestanding definitional power" independent of the guideline's text. Those issues do not warrant review.

a. First, petitioner's claim involves interpretation of the Sentencing Guidelines and the accompanying commentary. This Court ordinarily does not review decisions interpreting the Sentencing Guidelines because the Sentencing Commission can

amend the Guidelines and commentary to eliminate a conflict or correct an error. See Braxton v United States, 500 U.S. 344, 347-349 (1991). The Commission is charged by Congress with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Id. at 348; see United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices.") Particularly because the Guidelines are now advisory, id. at 245, this Court's review of the court of appeals' decision applying the career-offender guideline and associated commentary is not warranted.

b. Second, as explained above, the question whether unlawful possession of a sawed-off shotgun qualifies as a "crime of violence" under the current version of the career-offender guideline and commentary has no prospective importance in light of the Sentencing Commission's amendment to the guideline. The amendment moves offenses currently enumerated in the commentary -- including "unlawful possession a firearm described in 26 U.S.C. § 5845(a)" -- to the text of Section 4B1.2. 81 Fed. Reg at 4743 (noting that "[f]or easier application, all enumerated offenses are now included in the guideline at

§ 4B1.2; prior to the amendment, the list was set forth in both § 4B1.2(a)(2) and the commentary at Application Note 1").

c. In any event, petitioner's claim lacks merit Under this Court's decision in Stinson v. United States, 508 U.S. 36 (1993), Guidelines commentary "that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." Id. at 38. Stinson held that the provision of the commentary to the career offender guideline that excludes ordinary felon-in-possession offenses from the definition of "crime of violence," while not "compelled by the guideline text," was "a binding interpretation of the phrase 'crime of violence.'" Id. at 47. Likewise, the Sentencing Commission's interpretation of "crime of violence" to include unlawful possession of a prohibited weapon -- including a sawed-off shotgun -- "does not run afoul of the Constitution or a federal statute" and "is not plainly erroneous or inconsistent with § 4B1.2." Ibid. (internal quotation marks omitted). Stinson's conclusion that the Commission's determination that certain offenses do not qualify as predicate crimes of violence is valid and "binding" makes clear that the Commission's authority is not limited to construing the specific provisions in the text of the guideline. Even assuming that the career offender guideline's residual clause is no longer viable,

the Commission acted within its authority in defining unlawful possession of a sawed-off shotgun as a qualifying offense for sentencing enhancement under the guideline.[4]

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[4] As petitioner notes (Pet. 29-31), the First Circuit reached a contrary conclusion in United States v Soto-Rivera, 811 F.3d 53 (2016). The court held that, accepting the government's concession that Johnson applied to the Guidelines, the defendant's conviction for possession of a machine gun did not qualify as a "crime of violence" under the career offender guideline. Id. at 60-62. The court reasoned that without the residual clause, there was no "textual hook in Guidelines § 4B1.2(a) to allow for the conclusion that his possession of a firearm constituted a crime of violence," and that the commentary was therefore "inconsistent with the remaining text of the Guideline." Id. at 61-62. The court rejected the government's reliance on the court of appeals' decision in this case, stating that it "need not opine as to whether we believe Beckles was correctly decided" because "Beckles (like Hall before it) was grounded in the very language which the government itself now says must be excised from the Guidelines." Id. at 61. Any conflict between the First Circuit's ruling and the court of appeals' unpublished decision in this case does not warrant review in light of the amendment to the career offender guideline.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2016

No. 15-8544

IN THE SUPREME COURT OF THE UNITED STATES

TRAVIS BECKLES, PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION**, via email and first-class mail, postage prepaid, this 13th day of May, 2016.

[See Attached Service List]

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May 13, 2016

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No. 15-8544

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

TRAVIS BECKLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The application of *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), to both the residual clause of the career offender provision of the United States Sentencing Guidelines, U.S.S.G. § 4B1.2(a)(2), and its commentary are questions of immense importance to the myriad prisoners, like Mr. Beckles, whose sentences were enhanced under those provisions. The government acknowledges that the one-year statute of limitations governing collateral *Johnson* claims will expire on June 26, 2016. *See* BIO at 15; *Dodd v. United States*, 545 U.S. 353, 357 (2005). And it does not dispute that, as a result of the looming end of the limitations period, if the Court fails to resolve the questions presented herein this Term, prisoners "who have previously filed a Section 2255 motion will be left with no avenue for relief other than filing an original habeas petition in this Court." BIO at 15. The government also does not dispute Petitioner's showing, Pet. at 17-18, that thousands of federal prisoners have had their sentences enhanced under § 4B1.2(a)(2)'s residual clause, *see* BIO, *passim*.

The Court's conference for this case is set for June 2, 2016, a mere 24 days before the limitations period expires. The government has been unwilling to extend that date, despite its power to do so. *See Wood v. Milyard*, 132 S. Ct. 1826 (2012). Petitioner and others sentenced in the Eleventh Circuit under the Guidelines and seeking relief under *Johnson* have no recourse except to this Court. The petition should be granted.

ARGUMENT

1. In *Welch v. United States*, the Court's holding was clear and concise. "*Johnson* [*v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015)], is retroactive to cases on collateral review." 578 U.S. ___, 136 S. Ct. 1257, 1268 (2016). *Welch* did not limit its holding to collateral cases involving the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e). It simply held that *Johnson* is retroactive to collateral cases. That simple holding makes resolution of the first question presented equally simple. Petitioner's case, in which he seeks to vacate his sentence under 28 U.S.C. § 2255, is on collateral review. *Welch* therefore requires that *Johnson* applies retroactively to Petitioner's case.

Not only does *Welch* refute the government's retroactivity argument, the context in which the Court decided to grant review in that case also refutes the government's arguments as to why the Court should not grant review here. The government first asserts that review is unwarranted here because there is no conflict in the circuits "over whether *Johnson* is retroactive in an initial collateral motion under Section 2255 challenging application of the Guidelines' residual clause." BIO at 12. However, as is true of Petitioner here, Mr. Welch sought the Court's review of the Eleventh Circuit's denial of his *first* section 2255 motion. Nonetheless, what compelled the Court's decision to grant *certiorari* in *Welch* was a split in the circuits as to whether *Johnson* was a new rule of law that this Court had "made" retroactive to collateral cases so as to allow leave to file second or successive section 2255 motions under 28 U.S.C.

§ 2255(h)(2). And once the Court granted Mr. Welch's petition for writ of *certiorari* to consider the issue, its decision resolved the issue for initial and successive motions alike.

At present, a similar split in the circuits exists with respect to whether the Court has "made" *Johnson* retroactively applicable so as to authorize second or successive section 2255 motions seeking relief from sentences enhanced under the Guidelines. The Sixth, Seventh, and Tenth Circuits have all authorized second or successive section 2255 motions in cases where the applicant sought *Johnson* relief from a Guidelines sentence enhanced under the residual clause. The Seventh Circuit has done so because, in its estimation, "*Johnson* announced a new substantive rule of constitutional law" that is "categorically retroactive."[1] The Sixth Circuit has authorized successive motions because *Johnson* announced a "retroactively applicable rule of constitutional law."[2] And the Tenth Circuit has authorized successive motions

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[1] Order, *Stork v. United States*, No. 15-2687, at 1 (7th Cir. Aug. 13, 2015); *see also, e.g.*, Order, *Best v. United States*, No. 15-2417 (7th Cir. Aug. 5, 2015); Order, *Swanson v. United States*, No. 15-2776 (7th Cir. Sept. 4, 2015); Order, *Zollicoffer v. United States*, No. 15-3125 (7th Cir. Oct. 20, 2015); Order, *Spells v. United States*, No. 15-3252 (7th Cir. Oct. 22, 2015).

[2] Order, *In re Swain*, No. 15-2040 (6th Cir. Feb. 22, 2016); *see also, e.g.*, Order, *In re Grant*, No. 15-5795 (6th Cir., March 7, 2016); Order, *United States v. Ruvalcaba*, No. 15-3913 (6th Cir. March 24, 2016); Order, *In re Homrich*, No. 15-1999 (6th Cir. March 28, 2016).

because the Court "made *Johnson*'s holding retroactive to cases on collateral review in *Welch*."[3]

In sharp contrast, the Eighth[4] and Eleventh Circuits have denied applicants challenging sentences enhanced under the Guidelines's residual clause leave to file second or successive section 2255 motions, with the Eleventh Circuit doing so both before and after *Welch*.[5]

Accordingly, there is a 3-2 split in the circuit courts on whether *Johnson* has been "made" retroactively applicable to collateral cases in which the applicant is seeking relief from a sentence enhanced under the Guidelines's residual clause. It is a split that presages a split in the circuits with respect to initial motions, that will, at some point, require this Court's attention.

In *Welch*, the Court expedited consideration of the circuit split presented there because it understood that the one-year statute of limitations compelled a speedy resolution of the retroactivity issue, and the issue had the potential to provide sentencing relief to hundreds, if not thousands, of federal prisoners seeking

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[3] *In re Encinias*, __ F.3d __, 2016 WL 1719323, at *2 (10th Cir. Apr. 29, 2016) (No. 16-8038); *see also* Order, *In re Daniels*, No. 16-3093 (10th Cir. May 6, 2016); Order, *In re Bloomgren*, No. 16-8039 (10th Cir. May 9, 2016).

[4] *Richardson v. United States*, 623 F. App'x 841 (8th Cir. Dec. 16, 2015); *see also*, Order, *Sturdy v. United States*, No. 15-3639 (8th Cir. March 24, 2016) (unexplained denial).

[5] *In re Rivero*, 797 F.3d 986, 989 (11th Cir. 2015); Order, *In re Vasallo*, No. 16-11551 (11th Cir. April 28, 2016). Rivero has filed a petition for writ of habeas corpus in this Court seeking review of the Eleventh Circuit's decision in his case. *In re Gilberto Rivero*, No. 15-7776.

Johnson relief in both initial and successive section 2255 motions. The same is true here, except that here the urgent need for a speedy resolution is even greater.

The government next argues that Petitioner's case is not "an appropriate vehicle to decide the retroactivity questions" because Mr. Beckles did not raise, and the Eleventh Circuit did not decide, *Johnson*'s retroactivity below. BIO at 13-14. Again, in a different context – without the urgency or potential impact requiring resolution here – that might be a compelling argument. But desperate times require desperate measures. In *Welch*, the Court granted review the issue of *Johnson*'s retroactivity even though the court below had denied a certificate of appealability *before* this Court had even decided *Johnson*. *See* Order, *Welch v. United States*, No. 14-15733 (11th Cir. June 9, 2015). Accordingly, the question of *Johnson* and its retroactivity played no part in Mr. Welch's case below. Yet the Court nonetheless granted review of the retroactivity question because of the potential impact of the issue and the urgency created by the interaction of *Dodd* and the statute of limitations.

Moreover, even though the retroactivity issue was not ruled on below, its resolution is necessary for Mr. Beckles to obtain relief. Even if this Court answered the second and third questions presented in the affirmative, Mr. Beckles could not also obtain relief from his sentence under the Guidelines's residual clause unless the Court also answered the first question in the affirmative. This issue is squarely presented by this case, and the Court may therefore answer it.

2. The government agrees with Petitioner that *Johnson*'s holding invalidating the ACCA's residual clause, 18 U.S.C. § 924(e)(2)(B)(ii), invalidates the identically-worded and analytically-indistinct residual clause in the career offender guideline, U.S.S.G. § 4B1.2(a)(2). BIO at 15. The government also agrees that a circuit conflict exists as to whether *Johnson*'s holding applies to sentences imposed under the advisory Sentencing Guidelines. *Id.* at 16. At present, ten of the eleven courts of appeal have either decided that *Johnson* applies to the Guidelines, accepted the government's concession that it does, or assumed that it does.[6] The Eleventh Circuit stands alone in its holding that *Johnson* never applies to sentences imposed under the

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[6] The Second, Third, Sixth, and Tenth Circuits have held that *Johnson* invalidates the identical language in the Guidelines's residual clause. *United States v. Pawlak*, ___ F.3d ___ (6th Cir. May 13, 2016) (No. 15-3566); *United States v. Madrid*, 805 F.3d 1204, 1210 (10th Cir. 2015); *United States v. Welch*, ___ F. App'x ___, 2016 WL 536656 (2d Cir. Feb. 11, 2016) *United States v. Townsend*, ___ F. App'x ___, 2015 WL 9311394, at *4 (3d Cir. Dec. 23, 2015). The First, Fifth, and Ninth Circuits have applied *Johnson* to the Guidelines's residual clause based on the government's concession and remanded for resentencing absent the unconstitutional residual clause. *United States v. Soto-Rivero*, 811 F.3d 53, 59 (1st Cir. 2016); Order, *United States v. Estrada*, No. 15-40264 (5th Cir. Oct. 27, 2015); *United States v. Benavides*, 617 F. App'x 790, 790 (9th Cir. 2015). The Fourth Circuit has assumed that *Johnson* invalidates the Guidelines residual clause. *United States v. Frazier*, 621 F. App'x 166, 168 (4th Cir. 2015) (assuming without deciding that possession of a sawed-off shotgun no longer qualifies as a crime of violence after *Johnson*). And although the Seventh and Eighth Circuits held, prior to *Johnson* that the Guidelines were not susceptible to vagueness challenges, both have assumed without deciding that those decisions are no longer good law in light of *Johnson*. *United States v. Taylor*, 803 F.3d 931 (8th Cir. 2015) (prior circuit precedent "reasoning . . . that the guidelines cannot be unconstitutionally vague because they do not proscribe conduct is doubtful after *Johnson*"); *Ramirez v. United States*, 799 F.3d 845, 856 (7th Cir. 2015).

Guidelines's residual clause. *See United States v. Matchett*, 802 F.3d 1185, 1193-96 (11th Cir. 2015), *ptn. for rhg. en banc filed* (Oct. 13, 2015).[7]

The government additionally acknowledges the split in the lower courts as to whether, post-*Johnson*, possession of a sawed-off shotgun remains a qualifying offense for purposes of the career offender guideline. It concedes that the First Circuit has expressly rejected the reasoning of the Eleventh Circuit's decision below to hold that possession of a sawed-off shotgun is cannot qualify as a "crime of violence" under the career offender guideline post-*Johnson*. *See* BIO at 21 n.4 (citing *Soto-Rivero*, 811 F.3d at 61-62). Finally, the government does not dispute that there is a deep, longstanding split in the circuits as to whether the commentary to the career offender guideline has freestanding definitional power, or the offenses listed in the commentary must satisfy one of the definitions in the guideline's text. *See* BIO, *passim*.

Despite these concessions, the government argues that the Court's review is nonetheless unwarranted because questions two and three in the Petition are "of limited and diminishing prospective importance" given that the Sentencing

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[7] During more than seven months that the petition for rehearing *en banc* has been pending, the Eleventh Circuit has followed *Matchett* to hold that *Johnson* does not apply in cases where the defendant was sentenced under the advisory Sentencing Guidelines. *See, e.g., United States v. Ford*, ___ F. App'x ___, 2016 WL 2342756, *4 (11th Cir. May 4, 2016); *Jones v. United States*, ___ F. App'x ___, 2016 WL 1320800, *1 (11th Cir. April 5, 2016); *United States v. Jackson*, ___ F. App'x ___, 2016 WL 1253841, *6 (11th Cir. Mar. 31, 2016); *United States v. Casamayor*, ___ F. App'x ___, 2016 WL 722892, *5 (11th Cir. Feb. 24, 2016). This includes denying authorization for leave to file successive Section 2255 motions in cases where the movant was sentenced under the advisory Guidelines. *See, e.g., In re Dougan*, 16-11718 (April 29, 2016); *In re Vasallo*, No. 16-11551 (11th Cir. April 28, 2016); *In Re Carlos Cuchet*, No. 16-11489 (11th Cir. April 26, 2016).

Commission has adopted an amendment, effective August 1, 2016, that deletes the residual clause from the career offender guideline. BIO at 17; *see id.* at 21 n.4. The government is wrong.

First, the Commission's prospective deletion of the residual clause provides no more reason to reject review of these issues than did this Court's prospective voiding of the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii) ("ACCA") in *Johnson*. Under the government's logic, there was no reason for the Court to grant review in *Welch v. United States*, 136 S. Ct. 1257 (2016), because *Johnson*'s deletion of the residual clause from the ACCA rendered the question of its retroactive application of "limited and diminishing prospective importance." Yet the Court not only granted review in *Welch*, it expedited consideration.

Second, unlike *Welch*, which dealt only with *Johnson*'s application to initial and successive collateral cases, *Matchett* not only precludes *Johnson* relief in *all* Eleventh Circuit collateral proceedings, but also precludes *Johnson* relief in all Guidelines cases that are currently on direct appeal, and before the district courts for sentencing, as well as for any defendant who commits a federal offense prior to August 1, 2016. This is because the Commission deleted the residual clause and modified the commentary in the career offender guideline only prospectively; it did not make the amendment retroactive.[8] The amendment therefore affects only those cases where the defendant

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[8] U.S. Sent'g Comm'n, Public Meeting Minutes at 6-7 (Jan. 8, 2016), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160108/meeting_minutes.pdf (summarizing statements by Chair Patti B. Saris explaining that it would be too difficult to conduct impact analysis, which

committed his federal offense *after* August 1, 2016. Accordingly, the cognizability issues presented herein will linger much longer than the retroactivity issue resolved in *Welch*, but the same factors that warranted the Court's expedited consideration in *Welch* are found here.

Third, the inter-circuit sentencing disparities that *Matchett* creates will also linger. In the many circuits granting *Johnson* relief to defendants whose sentences were enhanced using the Guidelines's residual clause, ex post facto principles require those defendants to be resentenced using the current career offender guideline *absent* the residual clause. *See Peugh v. United States*, 133 S. Ct. 2072 (2013). In the Eleventh Circuit, all defendants who committed their instant offense before August 1, 2016 will be sentenced under the current career offender guideline *with* the residual clause intact. *See Matchett*, 802 F.3d at 1197 (concluding Florida burglary falls within residual clause and is therefore a "crime of violence" under U.S.S.G. § 4B1.2). Thus, *Johnson*'s application to the Guidelines and commentary – and the inter-circuit sentencing disparities that *Matchett* and the decision below create – will likely remain ongoing issues for years to come.

Fourth, the Commission's deletion of the residual clause in the career offender guideline does not resolve the longstanding division in the circuits as to whether the commentary to that guideline has freestanding definitional power, or whether offenses listed in the commentary must instead satisfy one of the definitions in the guidelines

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precluded a vote on making the amendment retroactive).

text. *See* Pet. at 32-34. The inchoate offenses of attempt, aiding and abetting, and conspiracy will continue to be listed in the commentary to the career offender guideline after August 1, 2016. *See* U.S.S.G. § 4B1.2, Application Note 1 ("For purposes of this guideline – 'Crime of violence' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."); 81 Fed. Reg. 4741-45 (2016). Inchoate offenses generally qualify as crimes of violence only under the residual clause because they do not have "as an element the use, attempted use, or threatened use of physical force against the person of another," and therefore are outside the reach of the so-called "elements clause."[9] Because inchoate offenses will remain in the guideline commentary notwithstanding the residual clause's deletion, are not enumerated and do not fall within the elements clause, those offenses will be unmoored from the definitions in the text of the guideline. Thus, whether the Commission may use the guidelines commentary to enumerate freestanding "crimes of violence" remains an ongoing issue even after the amendment takes effect.

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[9] *See, e.g., James v. United States*, 550 U.S. 192, 197 (2007) (attempted burglary not a "violent felony" under ACCA's elements clause, 18 U.S.C. § 924(e)(2)(B)(i), but qualifies under residual clause); *United States v. Gloss*, 661 F.3d 317, 319 (6th Cir. 2011) ("conspiracy or facilitation tends to be outside the reach of the [elements] clause and generally will be deemed a violent felony only if it qualifies under the residual clause"); *United States v. Gore*, 636 F.3d 728, 731-32 (5th Cir. 2011) (conspiracy to commit aggravated robbery does not come within ACCA's elements clause, but qualifies under residual clause); *United States v. White*, 571 F.3d 365, 369-72 (4th Cir.2009) (same); *United States v. Whiteon*, 597 F.3d 1218, 1223 (11th Cir. 2010) (*per curiam*) ("non-overt act conspiracy is *not* a section 4B1.1 'crime of violence'" under either elements clause or residual clause).

Finally, citing *Braxton v. United States*, 500 U.S. 344, 347-49 (1991), the government argues that Petitioner's third question does not warrant review because "this claim involves interpretation of the Sentencing Guidelines and the accompanying commentary" and the Court generally leaves questions of interpretation to the Sentencing Commission. BIO at 19. *Braxton* is irrelevant to the question presented. There, the Court left to the Commission the resolution of a circuit conflict over the meaning of guideline's text. 500 U.S. at 348. Here, the conflict in the lower courts is not over what the words "crime of violence" mean in the career offender guideline. It is about how to implement this Court's directive in *Stinson v. United States*, 508 U.S. 36, 38 (1993), that commentary "interpret[ing] or explain[ing] a guideline is authoritative unless it is inconsistent with, or a plainly erroneous reading of, that guideline." *See* Ptn. at 28-34. The Commission is not authorized to resolve, and never has resolved, a circuit split over whether and how to apply *Stinson*. *See* U.S.S.G., App. C, Vols. I, II, III & Supp. (collecting every amendment and reason therefore). *Braxton* is inapposite.

3. On the merits, the government contends that the Commission's interpretation of "crime of violence" in the commentary to U.S.S.G. § 4B1.2 to include possession of a sawed-off shotgun "'does not run afoul of the Constitution' and 'is not plainly erroneous or inconsistent with § 4B1.2.'" BIO at 20 (quoting *Stinson*, 508 U.S. at 38). The government is wrong. The Commission expressly included "unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (*e.g.*, a sawed-off shotgun or

sawed-off rifle, silencer, bomb or machine gun)" as an interpretation of the residual clause. U.S.S.G. App. C, amend. 674 (Nov. 1, 2004). With the residual clause eliminated from § 4B1.2 as void for vagueness, that commentary no longer interprets any portion of the guideline's text. Possession of a sawed-off shotgun contains no element of force, and is not an enumerated offense. With the residual clause deleted, the commentary results in "flat inconsistency" with § 4B1.2, because following the commentary "will result in violating the dictates" of the text. *Stinson*, 508 U.S. at 43.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit. Should the Court issue a writ, Petitioner also prays that the Court expeditiously issue a *per curiam* opinion resolving the questions presented herein.

Respectfully submitted,

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FEDERAL PUBLIC DEFENDER

By: _____
JANICE L. BERGMANN
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
May 20, 2016

No. 15-8544

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

TRAVIS BECKLES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE

I certify that on this 20th day of May, 2016, in accordance with SUP. CT. R. 29, copies of the Reply Brief for Petitioner were served by third party commercial carrier for delivery within three days upon the United States Attorney for the Southern District of Florida, 99 N.E. 4th Street, Miami, Florida 33132-2111, and upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

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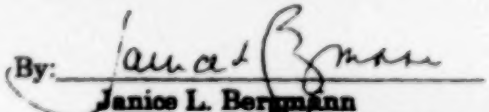
FEDERAL PUBLIC DEFENDER

Fort Lauderdale, Florida
May 20, 2016

By: 

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May 20, 2016

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Supreme Court of the United States
Washington, D.C. 20543-0001

RE: *Travis Beckles v. United States*, No. 15-8544

Dear Mr. Harris:

Enclosed please find for filing an original and ten copies of the Reply Brief for Petitioner in the above entitled and number case.

If you have any questions, please call me at (954) 640-7110.

Sincerely,

JANICE L. BERGMANN
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Counsel for Petitioner Travis Beckles

cc: Office of the Solicitor General

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RECORD AND BRIEFS

No. 15-8544

Supreme Court, U.S.
FILED
AUG 11 2016
OFFICE OF THE CLERK

In The Supreme Court of the United States

TRAVIS BECKLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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Certiorari Granted June 27, 2016

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RELEVANT DISTRICT COURT DOCKET ENTRIES

U.S. District Court
Southern District of Florida (Miami)
CRIMINAL DOCKET FOR CASE #:
1:07-cr-20305-CMA

Case title: USA v. Beckles
Magistrate judge case number: 1:07-mj-20506-EGT
Assigned to: Judge Cecilia M. Altonaga
Referred to: Magistrate Judge Andrea M. Simonton

Date Filed: 04/24/2007
Date Terminated: 10/17/2007

Defendant (1)

Travis Beckles

* * *

Pending Counts	Disposition
UNLAWFUL TRANSPORT OF FIREARMS (1)	Imprisonment for a term of 216 months; 5 years supervised release; $5,000.00 fine; and $100.00 special assessment.

* * *

Date Filed	#	Docket Text
04/24/2007	6	INDICTMENT as to Travis Beckles (1) count(s) 1. (pf) (Entered: 04/25/2007)

08/02/2007	42	JURY VERDICT as to Travis Beckles (1) Guilty on Count 1 (psl) (Entered: 08/02/2007)
10/17/2007	69	JUDGMENT as to Travis Beckles (1): Count(s) 1, Imprisonment for a term of 360 months; 5 years supervised release; $5,000.00 fine; and $100.00 special assessment. Signed by Judge Cecilia M. Altonaga on October 17, 2007. (psl) (Entered: 10/17/2007)
10/22/2007	71	NOTICE OF APPEAL by Travis Beckles re 69 Judgment (Spivak, Michael) (Entered: 10/22/2007)
11/02/2007	73	TRANSCRIPT of Trial filed as to Travis Beckles for dates of 8/2/07 before Judge Cecilia M. Altonaga, re 71 Notice of Appeal – Final Judgment Court Reporter: Barbara Medina – phone number 305-523-5518 1-150 pages. (cqs) (Main Document 73 replaced on 4/28/2014) (mc). (Entered 11/02/2007)
11/02/2007	75	TRANSCRIPT of Sentencing filed as to Travis Beckles for dates of 10/17/07 before Judge Cecilia M. Altonaga, re 71 Notice of Appeal – Final Judgment Court Reporter: Barbara Medina – phone number 305-523-5518 1-46 pages. (cqs) (Main Document 75 replaced on 4/28/2014) (mc). (Entered 11/02/2007)

05/21/2009	121	MANDATE OF USCA (certified copy) AFFIRMING the conviction and sentence in all respects of the district court with the court's opinion as to Travis Beckles; re 71 Notice of Appeal – Final Judgment, 72 Notice of Appeal – Final Judgment ; Date Issued: May 18, 2009 ; USCA Case Number: 07-15062-GG (mc) (Entered: 05/21/2009)
10/22/2009	132	WRIT OF CERTIORARI DENIED by US Supreme Court as to Travis Beckles, the courts mandate having previously issued, no further action will be taken by this court; re 71 Notice of Appeal – Final Judgment, 72 Notice of Appeal – Final Judgment. USCA# 07-15062-GG(mc) (Entered: 10/22/2009)
04/07/2010	133	MOTION to reduce sentence pursuant to Rule 35(b) by USA as to Travis Beckles. Responses due by 4/26/2010 (Koonin, Russell) Modified relief on 4/8/2010 (lk). (Entered: 04/07/2010)
06/22/2010	150	ORDER; re 133 Motion to Reduce Sentence as to Travis Beckles (1). The Defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 216 months. Signed by Judge Cecilia M. Altonaga on 6/22/2010. (asl) (Entered: 06/23/2010)

09/30/2010	151	**Motion to Vacate under 28 U.S.C. 2255 by Travis Beckles (civil case number 10cv23517.) All further docketing related to the motion to vacate is to be done in the civil case. (dgj) (Entered: 03/04/2013)**

RELEVANT COURT OF APPEALS DOCKET ENTRIES

United States Court of Appeals for the Eleventh Circuit

07-15062
USA v. Travis Beckles

CLOSED CRIMINAL

Date Appeal Docketed: 2007-10-29

District Court Information

Docket Number: 07-20305-CR-CMA
Judge: Cecilia M. Altonaga
Docket Date: 2007-04-24
District: Florida – Southern
Office: SFL – Miami
Notice of Appeal Date: 2007-10-22

Docket Activity

File Date	Entry	Party
10/31/07	Probable Jurisdiction Noted (Atty: Kathless M. Williams)	Travis Beckles
04/17/09	Opinion Issued	
05/18/09	Mandate Issued	
07/29/09	Notice of Filing Certiorari 09-5482: (Atty: Margaret Y. Foldes)	Travis Beckles
10/14/09	Certiorari Denied: 09-5492 (Atty: Margaret Y. Foldes)	Travis Beckles

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RELEVANT DISTRICT COURT DOCKET ENTRIES

U.S. District Court
Southern District of Florida (Miami)
CIVIL DOCKET FOR CASE #: 1:10-cv-23517-CMA

Beckles v. United States of America
Assigned to: Judge Cecilia M. Altonaga
Referred to: Magistrate Judge Andrea Simonton
Case in other court: USCA, 13-13569-BB
Cause: 28:2255 Motion to Vacate Sentence

Date Filed: 09/30/2010
Date Terminated: 03/04/2013
Jury Demand: None
Nature of Suit: 510 Prisoner: Vacate Sentence
Jurisdiction: U.S. Government Defendant

Date Filed	#	Docket Text
09/30/2010	1	Plaintiff's MOTION (Complaint) to Vacate Sentence (2255). NOTE: All further docketing is to be done in the civil case. (Criminal case # 07cr20305), filed by Travis Beckles. (Bergmann, Janice) Modified Event Type for MJSTAR on 6/23/2011 (ra). (Entered: 09/30/2010)
10/04/2010	5	ORDER REFERRING CASE to Ch. Magistrate Judge Stephen T. Brown for Report and Recommendation. Signed by Judge Cecilia M. Altonaga on 10/4/2010. (psl) (Entered 10/04/2010)

10/04/2010	6	ORDER TO SHOW CAUSE; Show Cause Response due by 12/6/2010. Signed by Ch. Magistrate Stephen T. Brown on 10/4/2010. (lh) (Entered: 10/05/2010)
12/06/2010	8	RESPONSE/REPLY to 1 Motion (Complaint) to Vacate/Set Aside/ Correct Sentence (2255) by United States of America. (Parente, Christopher) (Entered: 12/06/2010)
12/16/2010	9	RESPONSE/REPLY to 8 Response/ Reply (Other) *Motion to Vacate Sentence by* Travis Beckles. (Bergmann, Janice) (Entered: 12/16/2010)
12/14/2011	17	ORDER Requiring Supplemental Briefing and Setting Oral Argument on Motion. Signed by Magistrate Judge Andrea M. Simonton on 12/14/2011. (par) (Entered: 12/14/2011)
01/10/2012	19	SUPPLEMENT Brief to 17 Order Setting Hearing on Motion, Set/Reset Deadlines *Movant's Supplemental Brief* by Travis Beckles (Bergmann, Janice) Modified on 1/10/2012 (mr1). (Entered:01/10/2012)
01/17/2012	20	RESPONSE to Motion re 1 Complaint/Petition filed by United States of America. Replies due by 1/27/2012. (Parente, Christopher) (Entered: 01/17/2012)
01/24/2012	24	RESPONSE/REPLY to 20 Response to Motion by Travis Beckles. (Bergmann, Janice) (Entered: 01/24/2012)

03/09/2012	26	TEXT Minute Entry for proceedings held before Magistrate Judge Andrea M. Simonton: Motion Hearing held on 3/9/2012 re 1 Complaint/Petition filed by Travis Beckles. AFPD Janice Bergmann appeared on behalf of Plaintiff. AUSA Christopher Parente appeared on behalf of the Government. Travis Beckles appeared telephonically from FCI Coleman. Oral arguments heard. Report and Recommendation to follow. Court Reporter: Francine Salopek, 305-523-5568/ Francine_Salopek@flsd.uscourts.gov (aw) (Entered: 03/09/2012)
12/17/2012	27	REPORT AND RECOMMENDATIONS 1 Motion to Vacate pursuant to 28 U.S.C. 2255. Objections to R&R due by 1/3/2013. Signed by Magistrate Judge Andrea M. Simonton on 12/17/2012. (par) (Entered: 12/17/2012)
12/27/2012	28	OBJECTIONS to 27 Report and Recommendations on *Motion to Vacate Pursuant to 28 U.S.C. § 2255* by Travis Beckles. (Bergmann, Janice) (Entered: 12/27/2012)

01/02/2013	30	ORDER re 28 Objections to Report and Recommendations filed by Travis Beckles, 27 REPORT AND RECOMMENDATIONS on 28 USC 2255 case re 1 Complaint/Petition filed by Travis Beckles Recommending Denial of Motion to Vacate. The Government is to file a response by 1/11/2013. Signed by Judge Cecilia M. Altonaga on 1/2/2013. (psl) (Entered: 01/02/2013)
01/22/2013	33	RESPONSE TO OBJECTION to 27 Report and Recommendations by United States of America. (Moreno, Cristina) (Entered: 01/22/2013)
03/04/2013	34	ORDER not adopting 27 Report and Recommendations; the 1 Motion to Vacate filed by Travis Beckles is GRANTED. A new sentencing hearing will be scheduled under separate order after the time for filing an appeal has passed or an appeal has concluded. A final judgment will be entered separately. Signed by Judge Cecilia M. Altonaga on 3/4/2013. (psl) (Entered: 03/04/2013)
03/04/2013	35	FINAL JUDGMENT in favor of the Plaintiff and against the Defendant. Signed by Judge Cecilia M. Altonaga on 3/4/2013. (psl) (Entered: 03/04/2013)
05/30/2013	39	MOTION for Reconsideration *Based on Intervening Eleventh Circuit Decision* by United States of America. (Moreno, Cristina) (Entered: 05/30/2013)

06/05/2013	40	ORDER cancelling sentencing hearing pending resolution of 39 MOTION for Reconsideration *Based on Intervening Eleventh Circuit Decision* filed by United States of America. Signed by Judge Cecilia M. Altonaga on 6/5/2013. (psl) (Entered: 06/05/2013)
06/13/2013	41	RESPONSE in Opposition re 39 MOTION for Reconsideration *Based on Intervening Eleventh Circuit Decision* filed by Travis Beckles. (Bergmann, Janice) (Entered: 06/13/2013)
06/14/2013	42	ORDER granting 39 Motion for Reconsideration re 35 Judgment, Denying 1 Complaint/Petition filed by Travis Beckles. Signed by Judge Cecilia M. Altonaga on 6/14/2013. (lh) (Entered: 06/14/2013)
08/06/2013	43	Notice of Appeal as to 42 Order on Motion for Reconsideration by Travis Beckles. Filing fee $455.00. USA/FPD Filer – No Filing Fee Required. Within fourteen days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (Bergmann, Janice) (Entered: 08/06/2013)

10/30/2014	57	MANDATE OF USCA AFFIRMING the decision of the district court with court's opinion; re 43 Notice of Appeal, filed by Travis Beckles ; Date Issued: 10/30/2014 ; USCA Case Number: 13-13569-BB (mc) (Entered: 10/30/2014)
02/19/2016	59	MANDATE of USCA, ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES, AFFIRMING judgment/ order of the district court as to 43 Notice of Appeal, filed by Travis Beckles ; Date Issued: 2/19/16 ; USCA Case Number: 13-13569-BB (hh) (Entered: 02/19/2016)

RELEVANT COURT OF APPEALS DOCKET ENTRIES

General Docket
United States Court of Appeals
for the Eleventh Circuit

Court of Appeals	**Docketed:** 08/07/2013
Docket #: 13-13569	**Termed:** 09/29/2015
Nature of Suit: 2510 Prisoner Petition – Vacate Sentence	
Travis Beckles v. USA	
Appeal From: Southern District of Florida	
Fee Status: IFP Granted	

08/07/2013	HABEAS APPEAL DOCKETED. Notice of appeal filed by Appellant Travis Beckles on 08/06/2013 08/07/2013. Fee Status: IFP Granted.
11/04/2013	Appellant's brief filed by Travis Beckles. Service date: 11/04/2013 [13-13569] Attorney for Appellant: Bergmann – email; Attorney for Appellant: Caruso – email; Attorney for Appellee: Ferrer – email; Attorney for Appellee: Moreno – email; Attorney for Appellee: Salyer – email. (ECF: Janice Bergmann)
11/25/2013	*MOTION for initial hearing en banc filed by Travis Beckles. Opposition to Motion is Unknown. [7032087-1]* (ECF: Janice Bergmann)

12/06/2013	*MOTION for summary affirmance filed by USA. Motion is Opposed. [7041908-1] MOTION to stay the briefing schedule filed by USA. Opposition to Motion is Unknown. [7041908-1]* – [Edited 03/25/2014 by RAV] (ECF: Anne Schultz)
03/25/2014	ORDER: Motion for summary affirmance filed by Appellee USA is DENIED. [7041908-2]; Motion to stay briefing filed by Appellee USA is GRANTED. [7041908-3] the government has 30 days in which to file its responsive brief. GBT, BBM and AJ
04/24/2014	Appellee's Brief filed by Appellee USA. (ECF: Anne Schultz)
05/08/2014	Reply Brief filed by Appellant Travis Beckles. (ECF: Janice Bergmann)
09/05/2014	Judgment entered as to Appellant Travis Beckles.
09/05/2014	ORDER: Motion for initial hearing en banc filed by Appellant Travis Beckles is DENIED. [7032087-2] JLE
09/05/2014	Opinion issued by court as to Appellant Travis Beckles. Decision: Affirmed. Opinion type: Non-Published. Opinion method: Per Curiam.
10/30/2014	Mandate issued as to Appellant Travis Beckles.

06/30/2015	Writ of Certiorari filed as to Appellant Travis Beckles is GRANTED. The judgment of the Eleventh Circuit is VACATED and the case is REMANDED to the Eleventh Circuit. SC#14-7390.
08/03/2015	Judgment of the U.S. Supreme Court received as to Appellant Travis Beckles. 14-7390.
09/29/2015	Judgment entered as to Appellant Travis Beckles.
09/29/2015	Supreme Court remand opinion issued by court. Decision: Affirmed. Opinion type: Non-Published. Opinion method: Per Curiam.
10/21/2015	Petition for rehearing en banc (with panel rehearing) filed by Appellant Travis Beckles. (ECF: Janice Bergmann)
02/11/2016	ORDER: The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled, the Petition(s) for Rehearing En Banc filed by Appellant Travis Beckles are DENIED. [7697537-1]
02/19/2016	Mandate issued as to Appellant Travis Beckles.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Travis BECKLES,
Defendant-Appellant.

No. 07-15062.

United States Court of Appeals,
Eleventh Circuit.

April 17, 2009.

Margaret Y. Foldes, Michael David Spivack, Asst. Fed. Pub. Defenders, Kathleen M. Williams, Fed. Pub. Def., Miami, FL, for Beckles.

Kathleen M. Salyer, Anne R. Schultz, Kelly S. Karase, Miami, FL, for U.S.

Appeal from the United States District Court for the Southern District of Florida.

Before BIRCH and MARCUS, Circuit Judges, and FORRESTER,* District Judge.

MARCUS, Circuit Judge:

Travis Beckles appeals from his conviction and sentence for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g). He claims that his conviction should be overturned both because the district court erred in denying his motion to suppress

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* Honorable J. Owen Forrester, United States District Judge for the Northern District of Georgia, sitting by designation.

his post-arrest statements, and because the evidence was insufficient to permit a reasonable jury to find beyond a reasonable doubt that he knowingly possessed a firearm. Finally, Beckles argues that his sentence should be reversed because: (1) the district court plainly erred in sentencing him as a career offender under § 4B1.1 of the United States Sentencing Guidelines; (2) the sentence was unreasonable; and (3) the sentence violated the Fifth and Sixth Amendments to the United States Constitution since facts about his prior convictions were not found by the jury or charged in the indictment. After thorough review, we affirm both the conviction and the sentence.

I.

On April 24, 2007, Beckles was indicted by a federal grand jury in the United States District Court for the Southern District of Florida for possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g) and 924(e). Shortly thereafter, he moved to suppress all of the post-arrest statements he made to the Federal Bureau of Investigation ("FBI"), arguing that they were obtained in violation of his Fifth Amendment right to remain silent, due process, and *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

A. *The Suppression Hearing*

After conducting an evidentiary hearing on the motion to suppress, the magistrate judge determined

that the defendant was fully advised of his *Miranda* rights, understood his rights, and voluntarily, knowingly and intelligently waived them before speaking to Special Agent John Jefferson of the FBI. During the evidentiary hearing, the government presented testimony from Special Agent Jefferson, who interviewed Beckles on the day of his arrest and was present when the defendant was read his *Miranda* rights. Jefferson testified that Beckles was not only read his *Miranda* rights but that Beckles also initialed each line of a written copy of those rights after they were read aloud to him to indicate his understanding. Beckles then signed the entire *Miranda* rights form.

Special Agent Jefferson added that Beckles signed a form indicating that he was not under the influence of alcohol or drugs and understood English. Jefferson also said that Beckles did not evince any difficulty in understanding the documents that were read to him, or that Beckles was under the influence of any drugs, alcohol, or medication. He testified that Beckles never requested an attorney during the interview nor gave any indication he wished an attorney to be present. Finally, Jefferson said that Beckles cooperated throughout the interview and even volunteered to assist the government as an informant.

Beckles also testified at the suppression hearing, giving an account at war with that of Special Agent Jefferson. Beckles claimed that he told Jefferson he wanted to consult with a lawyer and that he only initialed and signed the written copy of his *Miranda* rights because he was advised that he could not speak

to a lawyer until the paper was signed. Beckles also testified that he did not tell the law enforcement officers he could read and write English, and signed the form indicating he could only because he was under the influence of marijuana. Beckles added that he did not understand what was going on during the interview, and explained that he had difficulty reading English but that he could understand spoken English.

The magistrate judge specifically credited Jefferson's account of his meeting with the defendant, finding that the defendant was fully afforded *Miranda* warnings orally and in writing, that the defendant understood his rights, and that the defendant knowingly and voluntarily answered the agent's questions. The district court adopted the magistrate judge's Report and Recommendation and denied the motion to suppress.

B. *The Trial*

Beckles was tried and convicted on all counts by a jury. The government adduced the following evidence. On April 11, 2007, while Miami Dade Detective Diego Castro was investigating a different case, he saw Beckles loitering in a public facility. When Castro, who was wearing a vest and shirt identifying himself as a police officer, exited his car, the defendant fled on foot. Castro followed Beckles, identified himself as a police officer, and instructed the defendant to stop running. Beckles fled to a nearby apartment. Castro heard screams from the apartment, and, after he knocked on the door, a

woman, Tiovanni Jones, emerged and told Castro to remove Beckles (whom she claimed not to know) from her apartment. Castro took Beckles into custody and placed him in a police car.

After Beckles was secured, Detective Castro spoke to Jones, who this time said that Beckles was her boyfriend, that he lived in the apartment at least part-time, and that he helped her pay the rent. Jones also claimed that there was a gun in the bedroom that she wanted removed for the safety of her child. After obtaining her permission to search the bedroom, Castro was unable to locate the gun. Castro then asked Beckles where the firearm was located. The defendant told Castro that there was a gun under the bed, but Castro was still unable to find it. Castro then brought Beckles into the apartment and Beckles told him that there was a shotgun under the mattress. Castro recovered the shotgun.

The prosecution also presented the testimony of Jones, who said that she lived in the apartment with her six-year-old son and her sister and that Beckles was her part-time live-in boyfriend. Jones added that neither she nor her sister kept a firearm in the apartment.

Later that day, FBI agents returned to Jones's apartment and photographed clothing and other items belonging to Beckles, including a toothbrush, a watch, and identification. Finally, the government offered at trial the testimony of Special Agent Jefferson, who said that, after being read his *Miranda* rights, Beckles

acknowledged that he was a drug dealer associated with a street gang, that he acquired the shotgun for protection, and that he kept the firearm in the apartment where he lived.

The government presented two stipulations of fact: that the defendant had been convicted in May 2004 of a felony crime punishable by imprisonment for a term exceeding one year; and that the Browning shotgun recovered by Detective Castro on April 11, 2007 had traveled in commerce.

The defendant rested without presenting any additional witnesses.

C. *The Sentence*

The Presentence Investigation Report ("PSI") reported that the offense of conviction was subject to a 15-year minimum term of imprisonment and a maximum of life. According to the PSI, "Detective Castro . . recovered a sawed off Browning shotgun underneath the mattress" in the bedroom of Jones's apartment after Beckles told him that was where the gun was located. (PSI ¶ 6). It calculated his base offense level at 26, because an 18 U.S.C. § 922(g)(1) offense involves, among other things, a "firearm that is described in 26 U.S.C. § 5845(a)." (PSI ¶ 12). The PSI also found that Beckles is an armed career criminal subject to an enhanced sentence under 18 U.S.C. § 924(e) and the career offender provision contained in § 4B1.1 of the Sentencing Guidelines, because Beckles was 18 years

old at the time of the instant offense, "the instant offense is a felony crime of violence (unlawful possession of a sawed-off shotgun)," and Beckles had two prior controlled substance felony convictions. (PSI ¶ 18). Thus, it calculated that Beckles had a total offense level of 37.

The PSI set forth Beckles's criminal history which included, in relevant part: (1) five convictions for possession with the intent to sell, manufacture, or deliver cocaine; (2) marijuana and cannabis possession offenses for which adjudication was withheld; and (3) a conviction for burglary of an unoccupied structure. Beckles's criminal history category was raised from V to VI, because he was a career offender under § 4B1.1. Based on a total offense level of 37 and a criminal history category of VI, the guidelines range was 360 months' to life imprisonment, including a mandatory minimum sentence of 15 years under 18 U.S.C. § 924(e)(1). The PSI also noted that Beckles was 24 years old; was abandoned by his parents at the age of five; described his childhood as "crazy"; began using drugs and having legal problems at a young age; and has a six-year-old son with a brain tumor who is undergoing chemotherapy. It also stated that the woman who raised Beckles said that he had a drug problem and could not read or write.

Beckles objected to the PSI, arguing that (1) the Sentencing Guidelines provided an excessive sentence; (2) police reports or other impermissible sources were used to calculate his criminal history category improperly; (3) the government did not prove the prior

convictions required for the 18 U.S.C. § 924(e) enhancement; (4) none of his prior state drug convictions qualified as serious drug offenses under 18 U.S.C. § 924(e) and the government should have been required to charge his prior felonies in the indictment and prove them beyond a reasonable doubt; (5) the enhancement pursuant to § 4B1.1 was unconstitutional because it relied on facts pertaining to Beckles's prior convictions not alleged in the indictment or proven to a jury beyond a reasonable doubt; and (6) applying the 18 U.S.C. § 924(e) enhancement was unconstitutional. Notably, Beckles did not object to the PSI's characterization of the firearm as a sawed-off shotgun or the enhancement of his offense level due to the classification of his current conviction as a felony crime of violence under § 4B1.1.

The district court conducted a sentencing hearing on October 17, 2007, during which the government put on a Miami-Dade Police Department fingerprint analyst to confirm that Beckles's fingerprints matched those on the certified Florida state court convictions ascribed to him for purposes of finding that his conduct fell within the career offender provision of the Sentencing Guidelines. The court concluded that the government had established the defendant's prior convictions and that the defendant qualified as an armed career criminal. The trial judge said the following:

> The defendant is considered a career offender because he was at least 18 at the time of this offense. This offense is a felony crime of violence, the unlawful possession of a sawed-off

> shotgun, and the defendant has at least two prior felony convictions of a controlled substance offense. The offense level, as noted in paragraph 18 of the presentence report, goes from an adjusted offense level of 26 up to 37 under the Sentencing Guideline § 4B1.1(b). So the defendant has started off today's sentencing hearing with an offense level of 37, a criminal history category of 6 and the Guidelines recommend a sentence of, at the low end, 360 months up to life.

The district court explained its sentence this way: "Beckles's long and continuous life of crime was never appropriately addressed at the State Court level. In other words . the defendant has 18 arrests that resulted in convictions and/or juvenile adjudications" and he is only 24 years old. (*Id.* at 40-41). It concluded "[t]hat's a pretty extensive criminal history. It's pretty continuous. . [W]hat stands out is that the defendant was never appropriately punished for any of his prior felony convictions." (*Id.* at 41). The district court added that it had "given careful consideration to the statutory factors contained in 18 U.S.Code § 3553," and that it was "mindful of the need to have this sentence reflect upon the seriousness of the offense, provide deterrence and safeguard the community from you, Mr. Beckles, because you have shown that you cannot live within the law." (*Id.* at 43). A sentence of 360 months of imprisonment, five months of supervised release, and a $5,000 fine was imposed.

This timely appeal ensued.

II.

A. *Motion to Suppress*

First, Beckles argues that his conviction must be reversed because the incriminating post-arrest statements he made to Special Agent Jefferson should have been suppressed. In as much as a ruling on a motion to suppress is a mixed question of law and fact, we review the district court's findings of fact for clear error and the application of the law to those facts *de novo*. *United States v. Zapata*, 180 F.3d 1237, 1240 (11th Cir.1999). We construe all facts in favor of the prevailing party (here the government). *United States v. Bervaldi*, 226 F.3d 1256, 1262 (11th Cir.2000).

Under the Fifth Amendment, "[n]o person . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In *Miranda*, the Supreme Court held that the government may not use statements stemming from the custodial interrogation of a criminal defendant unless the government demonstrates that it used procedural safeguards to ensure the privilege against self-incrimination remains intact. 384 U.S. at 444, 86 S.Ct. 1602. In particular, a defendant may waive his right against self-incrimination only if he does so "voluntarily, knowingly and intelligently." *Id.* A defendant's waiver of his *Miranda* rights is voluntary, knowing and intelligent if "it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it was "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision

to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). A written waiver "is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver." *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

When the facts are construed in a light most favorable to the government, there can be little question that Beckles made a voluntary, knowing, and intelligent waiver of his *Miranda* rights. Special Agent Jefferson testified that Beckles: (1) was read his *Miranda* rights; (2) indicated in writing that he understood his *Miranda* rights and was aware of the rights that he would give up if he chose to speak; (3) indicated in writing that he was not under the influence of drugs or alcohol; (4) did not appear to be under the influence of drugs or alcohol; (5) indicated in writing that he could understand English; (6) appeared to understand English and spoke with Jefferson in English; and (7) did not request an attorney or indicate that he did not wish to speak with law enforcement officers.

While Beckles did provide contradictory testimony, the district court made a detailed credibility determination in favor of the FBI agent's version of the events, and this decision was not clearly erroneous. *See United States v. Delancy*, 502 F.3d 1297, 1308 (11th Cir.2007) (explaining that factual findings are not clearly erroneous where the district court makes detailed credibility determinations that it does not believe a witness's claim at a hearing on a motion to suppress). In particular, the magistrate judge, whose

Report and Recommendation was adopted in full by the district court after a *de novo* review, explained that he chose to credit Special Agent Jefferson's account, and not Beckles's. In short, the district court did not err in denying Beckles's motion to suppress Beckles's incriminating post-arrest statements.

B. *Sufficiency of the Evidence*

Beckles also claims that his conviction must be reversed because it was supported by insufficient evidence. We remain unpersuaded.

We review *de novo* whether there is sufficient evidence in the record to support a jury's verdict in a criminal trial, viewing the evidence in the light most favorable to the government, and drawing all reasonable factual inferences in favor of the jury's verdict. *United States v. Williams*, 144 F.3d 1397, 1401 (11th Cir.1998). Accordingly, the evidence will be sufficient to support a conviction if "a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt." *United States v. Calhoon*, 97 F.3d 518, 523 (11th Cir.1996). In rebutting the government's evidence "[i]t is not enough for a defendant to put forth a reasonable hypothesis of innocence, because the issue is not whether a jury reasonably could have acquitted but whether it reasonably could have found guilt beyond a reasonable doubt." *United States v. Thompson*, 473 F.3d 1137, 1142 (11th Cir.2006).

To establish a violation of 18 U.S.C. § 922(g)(1), the government must prove three elements: "(1) that the

defendant was a convicted felon, (2) that the defendant was in knowing possession of a firearm, and (3) that the firearm was in or affecting interstate commerce." *United States v. Deleveaux*, 205 F.3d 1292, 1296-97 (11th Cir.2000). Beckles contests only the second element – that he did not knowingly possess a firearm.

"The government need not prove actual possession in order to establish knowing possession; it need only show constructive possession through direct or circumstantial evidence." *United States v. Greer*, 440 F.3d 1267, 1271 (11th Cir.2006). "Constructive possession exists when the defendant exercises ownership, dominion, or control over the item or has the power and intent to exercise dominion or control." *Id.* However, "a defendant's mere presence in the area of [an object] or awareness of its location is not sufficient to establish possession." *United States v. Pedro*, 999 F.2d 497, 500-01 (11th Cir.1993) (quotation marks omitted).

Here, the evidence, viewed in the light most favorable to the jury's determination, amply supports the verdict. Among other things, the government established that: (1) Beckles was Jones's boyfriend and lived at her apartment; (2) Beckles helped pay the rent; (3) Beckles's belongings were kept at the apartment, including his clothing, his toothbrush, his watch, and his identification; (4) the Browning shotgun was recovered in Jones's apartment; (5) Beckles knew where the shotgun was concealed and told Detective Castro its exact location; (6) Beckles apologized to Jones for bringing the shotgun into the apartment; (7) the shotgun did not belong to Jones or any of the other occupants or guests

at the apartment; and (8) Beckles said that he possessed the shotgun, and that he stole it to protect himself while dealing drugs. Thus, there was ample evidence to support the jury's finding that Beckles knowingly possessed the firearm. Indeed, most strikingly, Beckles admitted to Special Agent Jefferson that he had ownership and control over the shotgun and this testimony went uncontradicted at trial.

C. *Application of § 4B1.1 of the Sentencing Guidelines*

Beckles also says that his sentence must be reversed because, contrary to the finding of the district court, his conviction under 18 U.S.C. § 922(g) was not a "crime of violence" under § 4B1.1 of the Sentencing Guidelines. In particular, he claims that the district court erred by looking behind the face of his 18 U.S.C. § 922(g) conviction to make a finding that Beckles possessed a sawed-off shotgun within the meaning of 26 U.S.C. § 5845(a) and by increasing the Sentencing Guidelines calculation accordingly.

Due to multiple prior felonies, Beckles's violation of 18 U.S.C. § 922(g) subjected him to the enhanced penalty provision of 18 U.S.C. § 924(e)(1) and the district court found him to be an armed career criminal pursuant to that statute. This finding, in turn, qualified Beckles for a sentence enhancement under § 4B1.4. That provision of the Sentencing Guidelines instructs that the appropriate offense level is the

greater of: (1) the applicable offense level from Chapters 2 and 3 of the Sentencing Guidelines; (2) the offense level described in § 4B1.1, if applicable; (3) level 34, if the firearm possessed was of a type described in 26 U.S.C. § 5845(a); or (4) level 33. U.S.S.G. § 4B1.4(b).

Section 4B1.1, in turn, applies if:

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1(a). In particular, the Sentencing Guidelines specify that a "'[c]rime of violence' does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a)," and then reiterate that "[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence.'" U.S.S.G. § 4B1.2 Application Note 1.[1]

At sentencing, the district court found that § 4B1.1 was applicable and that it yielded the greatest

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[1] The commentary and application notes of the Sentencing Guidelines are authoritative, unless they are plainly erroneous, inconsistent with the regulation they interpret, or contrary to the Constitution or federal law. *Stinson v. United States*, 508 U.S. 36, 45, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993); *United States v. Torrealba*, 339 F.3d 1238, 1242 (11th Cir.2003).

offense level, reasoning that two of Beckles's prior felony convictions were for qualified controlled substances offenses, and the current 18 U.S.C. § 922(g) conviction was for a "crime of violence" because the firearm Beckles knowingly possessed was a sawed-off shotgun as defined in 26 U.S.C. § 5845(a).

On appeal, Beckles argues that § 4B1.1 does not apply to him because the instant conviction under 18 U.S.C. § 922(g) is not for a "crime of violence." Specifically, he suggests that he was convicted of unlawful possession of a firearm by a felon, not of unlawful possession of a 26 U.S.C. § 5845(a) firearm by a felon.

Despite making six objections to the PSI (including one to the application of § 4B1.1) and five amendments to his sentencing memorandum, Beckles never objected to the PSI's characterization of the firearm as a sawed-off shotgun or to the PSI's or district court's enhancement of his offense level under § 4B1.1 because his current conviction was for a felony crime of violence. Accordingly, we review the district court's decision for plain error. *See e.g.*, *United States v. Raad*, 406 F.3d 1322, 1323 (11th Cir.2005). To demonstrate plain error, Beckles has the burden of establishing that "(1) there is an error; (2) that is plain or obvious; (3) affecting [his] substantial rights in that it was prejudicial and not harmless; and (4) that seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *Id.* (quotation marks and citation omitted). We may exercise this review "sparingly and only in those circumstances in which a miscarriage of

justice would otherwise result." *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir.2005) (quotation marks and citation omitted). There can be little doubt this is a difficult and daunting hurdle for the appellant to cross, and Beckles has not done so today.

Indeed, Beckles has not established that there is any error, let alone that any such error is plain. To determine whether the instant offense is a "crime of violence" for purposes of enhancing a sentence under § 4B1.1, a district court may look outside of the "offense of conviction" to the conduct surrounding that conviction "if ambiguities in the judgment make the crime of violence determination impossible from the face of the judgment itself." *United States v. Spell*, 44 F.3d 936, 939-40 (11th Cir.1995); *United States v. Young*, 527 F.3d 1274, 1277 (11th Cir.2008) (same); *United States v. Owens*, 447 F.3d 1345, 1347 (11th Cir.2006) (same). Accordingly, we have permitted district courts to find additional facts when the crime for which the defendant was convicted encompasses both conduct that constitutes a crime of violence and conduct that does not constitute a crime of violence.[2] *See e.g.*, *United States v. Aguilar-Ortiz*, 450 F.3d 1271, 1276

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[2] Although all of the prior cases in our Circuit discussing when a judgment of conviction is ambiguous for purposes of § 4B1.1 address prior convictions, as opposed to the instant conviction, that difference gives us no pause. The law that applies to evaluating prior convictions surely applies with equal force to the evaluation of the instant conviction, particularly because the Sentencing Guidelines contain the same definition of "crime of violence" for both prongs of § 4B1.1(a).

(11th Cir.2006) (finding prior state judgment of conviction ambiguous because the Court was unable to say as a categorical matter that all convictions under it qualified as a "drug trafficking offense" under § 2L1.2(b)(1)(B)); *Spell*, 44 F.3d at 939 (holding that a prior state judgment of conviction for burglary was ambiguous because it encompassed some conduct which constituted a crime of violence and some which did not); *see also Greer*, 440 F.3d at 1273 (noting that the defendant's prior convictions for making terrorist threats under a Georgia statute did "not, without more, prove that he has been convicted of a violent felony for ACCA purposes" because the state statute prohibits both violent and non-violent conduct); *see also United States v. Dwyer*, 245 F.3d 1168, 1171 (10th Cir.2001) ("If the statute is ambiguous, or broad enough to encompass both violent and nonviolent crimes, a court can look beyond the statute to certain records of the prior proceeding.") (quotation marks omitted).

Here, an ambiguity does exist. Plainly, a violation of 18 U.S.C. § 922(g)(1) encompasses both conduct that the Sentencing Guidelines explicitly says is not a crime of violence and conduct that the Sentencing Guidelines explicitly denominates as a crime of violence. All that is required to violate 18 U.S.C. § 922(g) is that a convicted felon knowingly possess any firearm. Thus, this conviction encompasses conduct involving the possession of a standard firearm as well as the possession of a firearm that specifically meets the criteria of 26 U.S.C. § 5845(a). The distinction between these two

categories is important, because Congress and the Sentencing Commission have chosen to subject only those who possess 26 U.S.C. § 5845(a) firearms – which include, among other things, sawed-off shotguns that are less than 26 inches overall in length or have barrels that are less than 18 inches in length – to longer sentences, since those firearms "are inherently dangerous and when possessed unlawfully serve only violent purposes." U.S.S.G. Appx. C. Amend. 674 (2004).

Where an ambiguity exists and the underlying conviction may be examined, the district court can rely on the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Aguilar-Ortiz*, 450 F.3d at 1276 (*quoting Shepard v. United States*, 544 U.S. 13, 16, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)). For purposes of sentencing, the district court also may base its factual findings on undisputed statements found in the PSI, because they are factual findings to which the defendant has assented. *See United States v. Bennett*, 472 F.3d 825, 832-34 (11th Cir.2006).

Facts contained in a PSI are undisputed and deemed to have been admitted unless a party objects to them before the sentencing court "with specificity and clarity." *Id.* at 832 (concluding that an objection to the probation officer's use of non-*Shepard* materials in preparation of the PSI did not amount to a dispute of the facts). "It is the law of this circuit that a failure to object to allegations of fact in a PSI admits those facts for sentencing purposes" and "precludes the argument

that there was error in them." *United States v. Wade*, 458 F.3d 1273, 1277 (11th Cir.2006); *Bennett*, 472 F.3d at 832 ("A sentencing court's findings of fact may be based on undisputed statements in the PSI. Where a defendant objects to the factual basis of his sentence, the government has the burden of establishing the disputed fact. . Otherwise, the objection is waived."). Indeed, the defendant's failure to object to conclusory statements in the PSI renders those statements undisputed and permits the sentencing court to rely upon them without error even if there is an absence of supporting evidence. *United States v. Hedges*, 175 F.3d 1312, 1315 (11th Cir.1999).

Beckles's PSI repeatedly stated that the firearm he was convicted of knowingly possessing was a *sawed-off shotgun*. First, the PSI specified that "Detective Castro then recovered a sawed off Browning shotgun" (PSI ¶ 6), and observed, in making its base offense level calculation, that the offense involved "a semi-automatic firearm that is capable of accepting a large capacity magazine; or . . [a] firearm that is described in 26 U.S.C. § 5845(a)." (PSI ¶ 12). In explaining the applicable Chapter Four enhancements, the PSI also stated that "[t]he defendant is considered a career offender because he was at least 18 years old at the time of the instant offense, the instant offense is a felony crime of violence (unlawful possession of a sawed-off shotgun). . . " (PSI ¶ 18). The district court relied upon these undisputed facts found in the PSI and sentenced Beckles accordingly as a career offender under § 4B1.1. We can discern no error in the district court's reliance

on these facts in the PSI to sentence Beckles for possession of a sawed-off shotgun.[3]

But, even if Beckles had demonstrated error and that error was plain or obvious, his argument still could not succeed because he is unable to show that his substantial rights were affected by the error. The third prong of the plain error test "almost always requires that the error must have affected the outcome of the district court proceedings." *Rodriguez*, 398 F.3d at 1299 (quotation marks and citations omitted). "The standard for showing that is the familiar reasonable probability of a different result formulation, which means a probability sufficient to undermine confidence in the outcome." *Id.* (quotation marks and citations omitted). Thus, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). In that vein,

> if it is equally plausible that the error worked in favor of the defense, the defendant loses; if the effect of the error is uncertain so that we do not know which, if either, side it helped the defendant loses. Where errors could have cut either way and uncertainty exists, the burden is the decisive factor in the third prong of the

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[3] We note in passing that Beckles has not objected to the district court's finding that at least two of his prior state convictions were for controlled substance offenses that meet the requirements of § 4B1.1.

> plain error test, and the burden is on the defendant.

Rodriguez, 398 F.3d at 1300.

Simply put, on the record before us, the effect of the alleged error is uncertain; therefore, Beckles would lose even if he could show obvious error. No evidence has been adduced regarding the length and size of the shotgun possessed by Beckles, and Beckles has submitted nothing showing that the firearm was not, in fact, a sawed-off shotgun under 26 U.S.C. § 5845(a). Indeed, his attorney said at oral argument that she was unaware of the actual length of the firearm, and that it had been destroyed by the United States Marshals Service pursuant to an unopposed forfeiture order issued on December 21, 2007. Because we do not know whether the firearm Beckles possessed would have qualified Beckles as a career offender, we could do nothing other than speculate. Where such speculation is required to resolve the dispute, the appellant has not met and cannot meet "his burden of showing a reasonable probability that the result would have been different but for the error; he has not met his burden of showing prejudice; he has not met his burden of showing that his substantial rights have been affected." *Rodriguez*, 398 F.3d at 1301.

D. *Reasonableness*

Beckles also claims that his sentence should be reversed because it is an unreasonable one. Reviewing a sentence for reasonableness "merely asks whether the

trial court abused its discretion." *United States v. Pugh*, 515 F.3d 1179, 1189 (11th Cir.2008) (*quoting Rita v. United States*, 551 U.S. 338, 127 S.Ct. 2456, 2465, 168 L.Ed.2d 203 (2007)). Our reasonableness review consists of two steps. *Id.* at 1190. First, we must

> ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range.

Id. (*quoting Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586, 597, 169 L.Ed.2d 445 (2007).)[4] If the district court did not procedurally err, then we must consider the "substantive reasonableness of the sentence imposed under an abuse-of-discretion standard," based on the "totality of the circumstances." *Id.* (*quoting Gall*, 128 S.Ct. at 597). "The party who challenges the sentence

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[4] The § 3553(a) factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense; (3) the need for the sentence imposed to afford adequate deterrence; (4) the need to protect the public; (5) the need to provide the defendant with educational or vocational training or medical care; (6) the kinds of sentences available; (7) the Sentencing Guidelines range; (8) the pertinent policy statements of the Sentencing Commission; (9) the need to avoid unwanted sentencing disparities; and (10) the need to provide restitution to victims. 18 U.S.C. § 3553(a).

bears the burden of establishing that the sentence is unreasonable in the light of both th[e] record and the factors in section 3553(a)." *United States v. Thomas*, 446 F.3d 1348, 1351 (11th Cir.2006) (quotation marks omitted).

Beckles says his sentence is unreasonable because the district court failed to adequately consider the § 3553(a) factors and mitigating factors such as his troubled childhood, drug addiction, and ill child. But, at sentencing, the district court explicitly stated that it had "given careful consideration to" the factors found in 18 U.S.C. § 3553(a), that Beckles had committed a serious offense, and that there was a need to provide deterrence and safeguard the community from him. The record thus reflects the district court's adequate consideration of the § 3553(a) factors. In fact, "the district court need only acknowledge that it considered the § 3553(a) factors, and need *not* discuss each of these factors in either the sentencing hearing or in the sentencing order." *United States v. Amedeo*, 487 F.3d 823, 833 (11th Cir.2007) (quotation marks and punctuation omitted); *United States v. Talley*, 431 F.3d 784, 786 (11th Cir.2005) (stating that "an acknowledgment by the district court that it has considered the defendant's arguments and the factors in section 3553(a) is sufficient under *Booker*"). Accordingly, Beckles's sentence cannot be reversed on this ground.

E. *Imposition of 18 U.S.C. § 924(e) sentence*

Finally, Beckles argues that the district court violated the Fifth and Sixth Amendments to the United States Constitution when it applied 18 U.S.C. § 924(e), because the application of that provision – which instructs that district courts must impose a mandatory minimum sentence of 15 years upon anyone convicted of violating 18 U.S.C. § 922(g) who also has three previous violent felony or serious drug offense convictions committed on different occasions – was based upon facts about Beckles's prior convictions that were not found by the jury or charged in the indictment.

The Supreme Court has rejected Beckles's argument. In *Almendarez-Torres v. United States*, 523 U.S. 224, 247, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), the Court held that the government need not prove beyond a reasonable doubt that a defendant had prior convictions or allege those prior convictions in the indictment in order to use those convictions to enhance a defendant's sentence. This Court has confirmed repeatedly that *Almendarez-Torres* is good law and that "a district court does not err by relying on prior convictions to enhance a defendant's sentence." *United States v. Shelton*, 400 F.3d 1325, 1329 (11th Cir.2005); *see United States v. Dowd*, 451 F.3d 1244, 1253 (11th Cir.2006) (explaining that "we are bound by *Almendarez-Torres* until it is explicitly overruled by the Supreme Court"); *Greer*, 440 F.3d at 1273-76 (expressly rejecting the argument that a judge is forbidden by *Booker* and *Apprendi* from determining the factual nature of the prior

conviction in vacating the district court's refusal to impose the 18 U.S.C. § 924(e) mandatory minimum sentence because the jury did not determine whether the defendant's three prior convictions were for violent felonies).

Accordingly, we AFFIRM the conviction and sentence in all respects.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. -CIV-ALTONAGA
(Criminal Case No. 07-20305-CR-ALTONAGA)

TRAVIS BECKLES,

Movant,

v.

UNITED STATES
OF AMERICA,

Respondent. /

MOTION TO VACATE SENTENCE PURSUANT TO 28 U.S.C. § 2255 AND MEMORANDUM OF LAW IN SUPPORT

(Entered Sep. 30, 2010)

Movant, Travis Beckles, by and through undersigned counsel, files this motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. §2255 and memorandum in support, and states;

1. On April 24, 2007, Mr. Beckles was charged in a one-count indictment with possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). Crim. DE 6.[1]

[1] "Crim. DE" refers to docket entries in Mr. Beckles's underlying criminal case, No. 07-20305-CR-ALTONAGA.

2. Trial was held on August 2, 2007. Crim. DE 41. The jury convicted Mr. Beckles of violating § 922(g), as charged in the indictment. Crim. DE 42.

3. Thereafter, a Presentence Investigation Report was prepared. The PSI recommended that Mr. Beckles be sentenced as a career offender pursuant to United States Sentencing Guideline § 4B1.4(b)(2). PSI, ¶ 18. The Probation Officer found:

> The defendant is considered a career offender because he was at least 18 years old at the time of the instant offense, the instant offense is a felony crime of violence (unlawful possession of a sawed-off shotgun), and the defendant has at least two prior felony convictions of a controlled substance offense.

PSI, ¶ 18.

4. The PSI also indicated that Mr. Beckles qualified for an enhanced sentence as an armed career criminal under the provisions of 18 U.S.C. § 924(e). PSI, ¶ 18. Under § 924(e)(1), a person, such as Mr. Beckles, who is convicted of an offense under § 922(g), qualifies as an armed career criminal if they have three previous convictions for a violent felony or a serious drug offense. 18 U.S.C. § 924(e)(1). Mr. Beckles had three prior convictions for a serious drug offense.

5. Mr. Beckles's adjusted offense level without the Chapter Four enhancements was 26. PSI, ¶ 17. However, based on the conclusion that Mr. Beckles qualified as a career offender and armed career

criminal, the Probation Officer calculated Mr. Beckles's total offense level to be 37. PSI, ¶¶ 18, 20.

6. The Probation Officer next determined that Mr. Beckles had a total of 12 criminal history points, for a criminal history category of V. PSI, ¶ 41. However, because the PSI concluded that Mr. Beckles qualified as a career offender, his criminal history category was increased to VI pursuant to U.S.S.G. § 4B1.1. *Id.*

7. With a total offense level of 37 and a criminal history of VI, Mr. Beckles's guideline imprisonment range was 360 months to life. PSI, ¶ 79.

8. On October 17, 2007, the Court sentenced Mr. Beckles to a 360-month term of imprisonment. Crim. DE 69.

9. Mr. Beckles timely appealed to the United States Court of Appeals for the Eleventh Circuit, Crim. DE 71, arguing, *inter alia*, that his § 922(g) conviction was not a "crime of violence" under § 4B1.1 of the Sentencing Guidelines and he therefore [sic] wrongly sentenced as a career offender. While Mr. Beckles's case was on appeal, and after briefing was completed, the United States Supreme Court decided *Begay v. United States*, 533 U.S. 137, 128 S. Ct. 1581, 170 L. Ed. 2d 490 (2008), which narrowed the scope of what constitutes a violent felony under the Armed Career Criminal Act, and the Eleventh Circuit decided *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008), which held that the definition of "violent felony" for purposes of the Armed Career Criminal Act is "virtually identical" to the definition of a "crime of violence" for

purposes of the career offender enhancement, and that the crime of carrying a concealed firearm is not a crime of violence. Mr. Beckles advised the Eleventh Circuit of these decisions pursuant to Federal Rule of Appellate Procedure 28(j), arguing that they compelled the conclusion that his conviction under 18 U.S.C. § 922(g) was not a crime of violence, and he therefore did not qualify as a career offender.

10. On April 17, 2009, the Eleventh Circuit affirmed Mr. Beckles's conviction and sentence. *United States v. Beckles*, 565 F.3d 832 (11th Cir. 2009); Crim. DE 121. In pertinent part, the Eleventh Circuit concluded that because Mr. Beckles's § 922(g) offense involved the possession of a sawed-off shotgun, this Court did not err in determining that it was a "crime of violence" for purposes of the career offender guideline. *Id.* at 844. In reaching this conclusion the Eleventh Circuit relied upon the Application Note 1 to U.S.S.G. § 4B1.2, which states, in pertinent part, that "[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence'." *Beckles*, 565 F.3d at 842. The court of appeals' decision did not mention, much less discuss, either *Begay* or *Archer*. *See id.*, *passim*.

11. Thereafter, Mr. Beckles petitioned the United States Supreme Court for a writ of certiorari to review the Eleventh Circuit's decision. On October 5, 2009, the Supreme Court denied the writ. *Beckles v. United States*, 130 S. Ct. 272 (2009). This motion is therefore timely under 28 U.S.C. § 2255(f), because it is filed

within a year of the Supreme Court's denial of certiorari. *See Clay v. United States*, 537 U.S. 522, 527, 123 S. Ct. 1072, 1076, 155 L.Ed.2d 88 (2003).

12. On April 7, 2010, the government filed a motion for reduction of sentence pursuant to Federal Rule of Criminal Procedure 35. Crim. DE 133. On June 23, 2010, this Court issued an amended judgment that reduced Mr. Beckles's term of imprisonment by 40%, from 360 months to 216 months. Crim. DE 150.

13. On September 8, 2010, the Eleventh Circuit followed *Begay* and *Archer* to hold that the mere act of possessing a short-barreled shotgun is not a violent felony under the Armed Career Criminal Act. *United States v. McGill*, ___ F.3d ___, 2010 WL 3489079 (11th Cir. Sept. 8, 2010).

MEMORANDUM OF LAW

After the decisions in *Begay v. United States*, 533 U.S. 137, 128 S. Ct. 1581, 170 L. Ed. 2d 490 (2008), *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008), and *United States v. McGill*, ___ F.3d ___, 2010 WL 3489079 (11th Cir. Sept. 8, 2010), it is clear that Mr. Beckles "is not now, nor has he ever been a career offender." *Gilbert v. United States*, 609 F.3d 1159, 1165 (11th Cir. 2010). His conviction under 18 U.S.C. § 922(g) for unlawful possession of a sawed-off shotgun is no "crime of violence," and, accordingly, he does not qualify as a career offender. This Court should therefore vacate, set aside, and correct his sentence under 28 U.S.C. § 2255.

In *Begay*, the Supreme Court described the method by which courts should determine if an offense is a "violent felony" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. 924(e).[2] *See Begay*, 128 S. Ct. at 1584-88. In *Archer*, the Eleventh Circuit "extended *Begay*'s way of construing the ACCA 'violent felony' provision to U.S.S.G section 4B1.1-2 'crimes of violence.'" *United States v. Whitson*, 597 F.3d 1218, 1220 (11th Cir. 2010).[3] Thus, "'[p]recisely the same analytical framework applied by the courts in ascertaining the scope of a "crime of violence" logically obtains with respect to . . what kind of conduct [composes] a "violent felony."'" *McGill*, 2010 WL 3489079 at n.5 (quoting *United States v. Oliver*, 20 F.3d 415, 418 (11th Cir. 1994)).

In *McGill*, the Eleventh Circuit considered whether, in light of *Begay*, the unlawful possession of a short-barreled shotgun in violation of Fla. Stat. § 790.221(1)

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[2] The ACCA defines "violent felonies" as offenses which may be punished by more than a year's imprisonment and either: (i) "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another;" (the so-called "elements clause") or (ii) "[are] burglary, arson, or extortion, involve [] use of explosives" (the so-called "enumerated crimes") or "*otherwise* involve[] conduct that presents a serious potential risk of physical injury to another" (the so-called "residual clause"). *See* 18 U.S.C. § 924(e)(2)(B).

[3] The career offender enhancement of U.S.S.G. § 4B1.1-2 has nearly the same enumerated offenses as the ACCA – it lists "burglary of a dwelling" instead of "burglary" – and also includes an identically worded "elements clause" and "residual clause." *See* U.S.S.G. § 4B1.2(a).

constitutes a "violent felony" under the residual clause[4] of the ACCA, and held that it did not. *McGill*, 2010 WL 3489079 at *5. Specifically, *McGill* described the "three-step analysis" *Begay* requires courts to employ to determine whether an offense is a violent felony or crime of violence under the residual clause. *McGill*, 2010 WL 3489079 at *2. First, *Begay* requires the court to consider the offense generically, by examining how the law defines the offense. *Id.* Second, the court must "determine whether the generic offense 'involves conduct that "presents a serious potential risk of physical injury to another."'" *Id.* (quoting *Begay*, 553 U.S. at 141). Third, "if the offense does present such a risk, [the court] classif[ies] it as a violent felony only if it is 'roughly similar in kind as well as in degree of risk posed,' to the clause's example crimes: burglary, arson, extortion, and the unlawful use of explosives." *Id.* (quoting *Begay*, 553 U.S. at 143).

Applying the first step of the *Begay* analysis, the *McGill* court determined that McGill's prior conviction under Fla. Stat. § 790.221(1) was for the knowing possession of a short-barreled shotgun. *Id.* at *2. However, in the course of its examination of the Florida statute, the court of appeals noted that it excepts firearms which are lawfully possessed under federal law. *Id.* (citing Fla. Stat. § 790.221(3)). Accordingly, the court of

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[4] The court of appeals in *McGill* examined the possession of a short-barreled shotgun under the "residual clause" because that offense does not have as an element the use, attempted use, or threatened use of physical force, and is not one of the specific offenses enumerated in the ACCA or career offender provisions.

appeals "also examine[d] if McGill lawfully possessed this weapon under federal law," by reviewing the relevant provisions of the National Firearms Act ("NFA"),[5] and concluded that he did not. *Id.* Specifically, the court of appeals determined that "the NFA did not permit McGill to possess, or even to register, this NFA prohibited weapon." *McGill*, 2010 WL 3489079 at *2 (citing *inter alia*, 26 U.S.C. § 5845(a)). Thus, the court of appeals concluded, "the offense underlying McGill's conviction was his knowing possession of a short-barreled shotgun outlawed by both Florida *and federal* law." *Id.* (emphasis added)

Having determined that McGill's possession of a short-barreled shotgun violated federal as well as Florida law, the court of appeals next considered the second analytical step required by *Begay* – whether possession of a short-barreled shotgun as described by the NFA in 26 U.S.C. § 5845(a) presented a serious potential risk of physical injury to another. *McGill*, 2010 WL 3489079 at *3. Here, the court of appeals noted that in *United States v. Owens*, 447 F.3d 1345, 1347 (11th Cir. 2006), it previously determined that possession of a short-barreled shotgun in violation of the NFA is a "crime of violence" for purposes of the career offender provision, and that this determination "compels the conclusion that possessing an unregistered short-barreled shotgun 'involves conduct that presents a serious potential

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[5] The NFA is currently codified as amended as 26 U.S.C. ch. 53. *See* 26 U.S.C. § 5849.

risk of physical injury to another' under the ACCA." *McGill*, 2010 WL 3489079 at *3.

Importantly, however, the *McGill* court noted that *Owens*'s holding that possession of a short-barreled shotgun is a "crime of violence" for purposes of the career offender provision was no longer controlling law because that holding "depended upon a two-step inquiry," and "[w]hen the Supreme Court later decided *Begay*, it added a third step." *McGill*, 2010 WL 3489079 at *3. *Begay*'s third step required the court of appeals to determine whether "possessing an outlawed short-barreled shotgun [is] 'roughly similar, in kind as well as degree of risk posed' to burglary, arson, extortion, and the unlawful use of explosives." *Id.* The *McGill* court determined that even accepting that the unlawful *use* of a short-barreled shotgun was roughly similar to the "unlawful *use* of explosives" in terms of dangerousness and violence, "Congress included only the *use*, but not the *possession of*, explosives among the ACCA's example crimes." *Id.* at *4. The court of appeals therefore concluded that McGill's "*possession* of a short-barreled shotgun is not 'similar in kind' to '*use* of explosives,' its closest enumerated analog, or to the other crimes listed in the ACCA's residual clause" and "fails *Begay*'s third analytical step for this reason." *Id.* at *4, *5 (citing *Begay*, 553 U.S. at 143) (emphasis added here).

In conclusion, *McGill* determined that because possession of a short-barreled shotgun failed *Begay*'s third step, "McGill's prior conviction for possessing an

outlawed short-barreled shotgun" "was not a violent felony under the ACCA." *Id.* at *5.

Here, on direct appeal, the Eleventh Circuit relied upon Application Note 1 to U.S.S.G. § 4B1.2 to conclude that Mr. Beckles's conviction for possession of an outlawed short-barreled shotgun was a crime of violence for purposes of the career offender provision. However, the application notes of the Sentencing Guidelines are "authoritative, *unless* they are contrary to . federal law." *Beckles*, 565 F.3d at 842 n.1 (citing *Stinson v. United States*, 508 U.S. 36, 45, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993) and *United States v. Torrealba*, 339 F.3d 1238, 1242 (11th Cir. 2003)). As discussed above, *McGill* held that possession of [sic] short-barreled shotgun in violation of the NFA is not a violent felony under the ACCA, and that "'[p]recisely the same analytical framework applied by the courts in ascertaining the scope of a "crime of violence" logically obtains with respect to . . . what kind of conduct [composes] a "violent felony."'" *McGill*, 2010 WL 3489079 at n.5 (quoting *Oliver*, 20 F.3d at 418). Thus, *McGill*'s conclusion that possession of an outlawed short-barreled shotgun is not a violent felony under the ACCA requires the conclusion that possession of an outlawed short-barreled shotgun is not a crime of violence for purposes of the career offender provision. As a result, Application Note 1 to U.S.S.G. § 4B1.2 is "contrary to . federal law," and can no longer be considered "authoritative." *Beckles*, 565 F.3d at 842 n.1.

Moreover, although the Eleventh Circuit held pre-*Begay* that possession of a short-barreled shotgun in

violation of the NFA is a "crime of violence" for purposes of the career offender provision, *see Owens*, 447 F.3d at 1347, *McGill* expressly determined that conclusion has been abrogated by *Begay*. *See McGill*, 2010 WL 3489079 at *3. For these reasons, Mr. Beckles's conviction under 18 U.S.C. § 922(g) for being a felon in possession of a sawed-off shotgun is no "crime of violence," and, accordingly, he "is not now, nor has he ever been a career offender," *Gilbert*, 609 F.3d at 1165.

Finally, Mr. Beckles has been prejudiced [sic] the imposition of the career offender enhancement. Without that enhancement, Mr. Beckles would have been sentenced as an armed career criminal with a total offense level of 34 and a criminal history category of VI, *see* U.S.S.G. § 4B1.4, resulting in a guideline range of 262-327 months, *see* Sentencing Table, U.S.S.G. (2006). Giving Mr. Beckles the benefit of the 40% reduction in sentence resulting from the government's Rule 35 motion, his advisory guidelines range without the career offender enhancement would be 157-196 months. Of course, because he is an armed career criminal, Mr. Beckles is subject to a mandatory minimum sentence of 15 years. *See* 18 U.S.C. § 924(e). Regardless, even a 15-year sentence is well below his current term of imprisonment of 216 months. This Court should therefore grant relief under 28 U.S.C. § 2255.

RELIEF REQUESTED

WHEREFORE, the Movant, Travis Beckles, asks this Court to grant his Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 and requests that he be resentenced without the career offender enhancement.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 10-23517-CV-ALTONAGA/BROWN
Case No. 07-CR-20305-ALTONAGA

TRAVIS BECKLES

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent. /

UNITED STATES' RESPONSE TO MOVANT'S MOTION TO VACATE SENTENCE PURSUANT TO TITLE 28 U.S.C. § 2255

(Entered Dec. 6, 2010)

COMES NOW the United States of America, by and through the undersigned Assistant United States Attorney, and files this Response in opposition to Movant Beckles' Motion to Vacate Sentence Pursuant to Title 28, United States Code § 2255 ("Motion to Vacate") (Civ. D.E. 1).

I. INTRODUCTION OF ALLEGATIONS

The instant 2255 petition sets forth a single claim, to wit, that in view of the Supreme Court's decision in *Begay v. United States*, 128 S. Ct. 1581 (2008) and the Eleventh Circuit's resulting decisions in *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008) and *United States v. McGill*, 618 F.3d 1273 (11th Cir. 2010), that

movant Beckles is not a career offender under the Guidelines and thus requests to be resentenced without the career offender enhancement.

II. STATEMENT OF THE CASE

On April 11, 2007, law enforcement officers searching for suspects in a bank robbery investigation approached Beckles who was exiting his vehicle. (PSI ¶4). Upon seeing law enforcement approaching, Beckles immediately fled the scene. (Id.) Beckles ran into an apartment and was quickly captured and placed under arrest. (PSI ¶5). A subsequent search of the apartment, which was later determined to be rented by Beckles, revealed a sawed off shotgun underneath his mattress. (PSI ¶6).

On April 24, 2007, a federal grand jury in the Southern District of Florida returned a one-count indictment against Beckles charging him with possession of a firearm by a convicted felon in violation of 18 U.S.C. §§922(g) and 924(e) (DE 6).

On August 2, 2007, Beckles was tried and convicted of the sole count in the indictment (DE 41, 42). The United States Probation Office prepared a Presentence Investigation Report ("PSI"). The PSI found that Beckles was an armed career criminal under 18 U.S.C. §924(e) and United States Sentencing Guidelines (U.S.S.G.) § 4B1.4 (PSI ¶18). The PSI calculated Beckles' guideline offense level as an armed career criminal pursuant to U.S.S.G. § 4B1.4(b)(2) by using the career offender guideline. The PSI determined that Beckles

qualified for the career offender guideline because (1) Beckles was at least 18 years of age at the time of the instant offense, (2) the instant offense of conviction was a felony that was a crime of violence (because the gun was a sawed-off shot gun)[1], and (3) Beckles had at least two prior felony convictions of either a "crime of violence" or a "controlled substance offense." (PSI ¶18).

Due to this finding, the PSI recommended an offense level of 37 and a criminal history category of VI. (PSI ¶79). The PSI found that there was a 15-year minimum sentence and that the guideline range was 360 months-Life. (PSI ¶¶ 78-79). Beckles filed a written sentencing memorandum (DE 55), which was later supplemented with several addenda (DE 57, 61, 62, 65, 66). Beckles also filed a *pro se* "constitutional objection" to the PSI (DE 60). Beckles never challenged the PSI's enhancement of his offense level due to the classification of his current conviction as a felony crime of violence under U.S.S.G § 4B1.1.

At sentencing, Beckles' counsel addressed only two of the arguments he had made in his sentencing memoranda. First, counsel argued that *Booker* required all facts supporting sentence enhancements be found by a jury beyond a reasonable doubt (DE 75, at 7). Second, counsel argued that Beckles' criminal record overstated his criminal past and urged the court to

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[1] Recently, in *United States v. McGill*, 618 F.3d 1273 (11th Cir. 2010), the Eleventh Circuit determined that possession of a short-barreled shotgun was not a "crime of violence" under the Armed Career Criminal Act.

movant Beckles is not a career offender under the Guidelines and thus requests to be resentenced without the career offender enhancement.

II. STATEMENT OF THE CASE

On April 11, 2007, law enforcement officers searching for suspects in a bank robbery investigation approached Beckles who was exiting his vehicle. (PSI ¶4). Upon seeing law enforcement approaching, Beckles immediately fled the scene. (Id.) Beckles ran into an apartment and was quickly captured and placed under arrest. (PSI ¶5). A subsequent search of the apartment, which was later determined to be rented by Beckles, revealed a sawed off shotgun underneath his mattress. (PSI ¶6).

On April 24, 2007, a federal grand jury in the Southern District of Florida returned a one-count indictment against Beckles charging him with possession of a firearm by a convicted felon in violation of 18 U.S.C. §§922(g) and 924(e) (DE 6).

On August 2, 2007, Beckles was tried and convicted of the sole count in the indictment (DE 41, 42). The United States Probation Office prepared a Presentence Investigation Report ("PSI"). The PSI found that Beckles was an armed career criminal under 18 U.S.C. §924(e) and United States Sentencing Guidelines (U.S.S.G.) § 4B1.4 (PSI ¶18). The PSI calculated Beckles' guideline offense level as an armed career criminal pursuant to U.S.S.G. § 4B1.4(b)(2) by using the career offender guideline. The PSI determined that Beckles

qualified for the career offender guideline because (1) Beckles was at least 18 years of age at the time of the instant offense, (2) the instant offense of conviction was a felony that was a crime of violence (because the gun was a sawed-off shot gun)[1], and (3) Beckles had at least two prior felony convictions of either a "crime of violence" or a "controlled substance offense." (PSI ¶18).

Due to this finding, the PSI recommended an offense level of 37 and a criminal history category of VI. (PSI ¶79). The PSI found that there was a 15-year minimum sentence and that the guideline range was 360 months-Life. (PSI ¶¶ 78-79). Beckles filed a written sentencing memorandum (DE 55), which was later supplemented with several addenda (DE 57, 61, 62, 65, 66). Beckles also filed a *pro se* "constitutional objection" to the PSI (DE 60). Beckles never challenged the PSI's enhancement of his offense level due to the classification of his current conviction as a felony crime of violence under U.S.S.G § 4B1.1.

At sentencing, Beckles' counsel addressed only two of the arguments he had made in his sentencing memoranda. First, counsel argued that *Booker* required all facts supporting sentence enhancements be found by a jury beyond a reasonable doubt (DE 75, at 7). Second, counsel argued that Beckles' criminal record overstated his criminal past and urged the court to

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[1] Recently, in *United States v. McGill*, 618 F.3d 1273 (11th Cir. 2010), the Eleventh Circuit determined that possession of a short-barreled shotgun was not a "crime of violence" under the Armed Career Criminal Act.

impose the 15-year mandatory minimum term of imprisonment (*id.* at 8). The Court rejected both of Beckles' arguments and concluded that Beckles had been given "too many passes" by state court judges and speculated that "that sent the wrong message to you" (*id.*, 41). The court concluded,

> I have given careful consideration to the statutory factors contained in 18 U.S. Code §3553. I am mindful of the need to have this sentence reflect upon the seriousness of the offense, provide deterrence and safeguard the community from you, Mr. Beckles, because you have shown that you cannot live within the law.

(*id.*, 43). Beckles was sentenced to imprisonment for a term of 360 months. (DE 67).

On October 22, 2007, Beckles filed a timely notice of appeal. (DE 71). On appeal, for the first time, Beckles challenged the application of U.S.S.G §4B1.1 arguing that his conviction for possession of a short-barreled shotgun in violation of 18 U.S.C. §922(g) was not for a "crime of violence." Because Beckles never raised this objection in the district court the Court reviewed the district court's decision for plain error. On May 21, 2009, the Eleventh Circuit affirmed Beckles' conviction (DE 121). On October 22, 2009, the United States Supreme Court denied certiorari (DE132). On June 22, 2010, Beckles' sentence was reduced to 216 months pursuant to a Rule 35(b) motion filed by the United States (DE 150). On September 30, 2010, the defendant filed the instant motion seeking relief under 28 U.S.C. §2255. (Civ. DE 1).

III. MEMORANDUM OF LAW

A. Movant's 2255 is Timely Filed Under Section 105 of the AEDPA

As a preliminary matter, this Court must decide whether the time-limit provisions in Section 2255, as set forth in Section 105 of the AEDPA, permit the filing of Beckles' habeas motion.

Beckles' motion is timely if it was filed one year from any of the following:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C § 2255(f).

Section 2255(f)(1) Applies in this Case

A prisoner has one year from when the judgment of conviction becomes final to file his 2255 motion. When a prisoner files a petition for certiorari seeking review of the court of appeals' judgment affirming his conviction, the judgment of conviction becomes final when the Supreme Court denies certiorari. *See, Washington v. United States*, 243 F.3d 1299, 1300 (11th Cir. 2001). Here, the Supreme Court denied certiorari on October 22, 2009 (DE 132). Beckles filed the instant 2255 motion on September 30, 2010. Therefore, the motion is timely filed.

B. Beckles' Guidelines Challenge is Not Cognizable

Beckles' Motion simply claims that since his current count of conviction (possession of sawed-off shotgun) is no longer considered a "crime of violence" after the Eleventh Circuit's decision in *United States v. McGill*, 618 F.3d 1273, the district court's application of the career offender guideline in his case was erroneous. While Beckles is correct that *McGill* determined that possession of a short barreled shotgun is no longer a "crime of violence" for purposes of the Armed Career Criminal Act, this claimed sentencing defect is not constitutional, does not involve a lack of jurisdiction, does not relate to a sentence that exceeds the statutory maximum, and does not lead to a complete miscarriage of justice. Thus, Beckles' claim is not a cognizable claim under 28 U.S.C. § 2255.

Most claims that do not assert constitutional or jurisdictional errors are not cognizable on collateral review. Section 2255 permits a court to grant relief if "the sentence was imposed in violation of the Constitution or laws of the United States, or . the court was without jurisdiction to impose such sentence, or the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a).[2] The courts have clarified that § 2255 applies to non-jurisdictional claims based on a federal statute or rule only if the claim alleges a "fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428 (1962). Courts have applied this standard to hold that most non-constitutional violations of federal law are not cognizable on collateral review. *See, e.g., United States v. Timmreck*, 441 U.S. 780, 783-84 (1979) (claim that district court violated Fed. R. Crim. P. 11 by failing to advise defendant of mandatory parole term before accepting guilty plea not

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[2] Post-*Begay* challenges to sentences imposed under the Armed Career Criminal Act (ACCA) are materially different from challenges to the career offender provision of the advisory Sentencing Guidelines. The maximum sentence under 18 U.S.C. § 922(g) is 10 years' imprisonment. But the ACCA requires that a defendant be sentenced to not less than 15 years' imprisonment. Here, it is undisputed that Beckles has three previous convictions for serious drug offenses and qualifies as an armed career criminal. (Civ. DE 1, at 2, 10). In contrast, application of the career offender guideline does not change the maximum sentence for the offense or mandate a minimum sentence. It is merely an advisory guideline for the District Court to consider.

cognizable in § 2255 proceeding); *Hill*, 368 U.S. at 429 (claim that court violated Fed. R. Crim. P. 32 by failing to give defendant opportunity to make a statement before imposing sentence not cognizable in § 2255 proceeding).

The Eleventh Circuit and other courts have held that claims of non-constitutional error in the application of the Sentencing Guidelines cannot be raised in a § 2255 motion unless the error causes a complete miscarriage of justice. *See Burke v. United States*, 152 F.3d 1329 (11th Cir. 1998) (recognizing possibility that non-constitutional guideline claim is cognizable, but finding no "fundamental defect" even where Sentencing Guidelines were mandatory and subsequent clarifying guideline amendments demonstrate that original two-level upward adjustment for obstruction of justice was error); *see also United States v. Pregent*, 190 F.3d 279, 283-84 (4th Cir. 1999) ("Barring extraordinary circumstances," claims of non-constitutional error in application of the mandatory Sentencing Guidelines cannot be raised in a Section 2255 motion); *Buggs v. United States*, 153 F.3d 439, 443 (7th Cir. 1990) (error in applying mandatory Guidelines not cognizable); *United States v. Payne*, 99 F.3d 1273, 1281-82 (5th Cir. 1996) (same); *Graziano v. United States*, 83 F.3d 587, 589-90 (2d Cir. 1996) (per curiam) (same); *Grant v. United States*, 72 F.3d 503, 505-06 (8th Cir. 1995) (same); *United States v. Schlessinger*, 49 F.3d 483, 485 (9th Cir. 1994); *Knight v. United States*, 37 F.3d 769, 773 (1st Cir. 1994) (same).

For example, claims that the sentencing court improperly applied the career offender provision of the Sentencing Guidelines have been found not cognizable in a Section 2255 proceeding.[3] *See Auman v. United States*, 67 F.3d 157 (8th Cir. 1995) (claim by defendant that district court improperly used prior conviction for possession of controlled substance as predicate offense in determining career offender status of defendant under mandatory Sentencing Guidelines based on determination that offense was crime of violence was not cognizable on motion to vacate sentence); *United States v. Segler*, 37 F.3d 1131 (5th Cir. 1994) (petitioner's claim that district court misapplied mandatory Sentencing Guidelines in sentencing him as a career offender could not be raised in post-conviction petition;

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[3] We note that the [sic] in *Young v. United States*, 936 F.2d 533, 535-38 (11th Cir. 1991), the Eleventh Circuit reversed a district court decision denying a § 2255 motion based on a prisoner's allegation that he had been improperly sentenced as a career offender. The issue of cognizability was not mentioned anywhere in the *Young* opinion. The Court simply addressed the merits of Young's claim without considering whether such a claim was even cognizable under § 2255. Therefore, the United States respectfully submits that *Young* should not be read as either conflicting with *Burke's* subsequent holding that guidelines claims are generally not cognizable or foreclosing such an argument. *See, e.g., United States v. L.A. Truck Lines, Inc.*, 344 U.S. 33, 37-38, 73 S.Ct. 67, 69-70 (1952) ("Even as to our own judicial power or jurisdiction this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*"); *Tanner Advertising Group, L.L.C. v. Fayette County, Georgia*, 451 F.3d 777, 794 (11th Cir. 2006) ("Because the issues of standing and overbreadth were not discussed in [a prior U.S. Supreme Court case], that case has no bearing on these issues.").

applying Guidelines to determine career offender status did not implicate constitutional issues and claim could have been raised on direct appeal); *United States v. Williamson*, 183 F.3d 458, 461-62 (5th Cir. 1999) ("[M]isapplications of the [career offender] Sentencing Guideline are not cognizable in Section 2255 motions").

A claim that there was a miscarriage of justice because a new decision interpreting the career offender guideline shows that the guideline was misapplied is materially different from a claim challenging a sentence that was enhanced under the career offender provision of the Guidelines based on a prior conviction that has been subsequently vacated. We agree that the latter claim would be cognizable under § 2255. *See Johnson v. United States*, 544 U.S. 295, 303 (2005) (recognizing that defendant given a sentence enhanced under the career offender provision for a prior conviction that has subsequently been vacated has a cognizable claim under § 2255 but holding that the defendant was procedurally barred because he did not meet the requirements of § 2255(f)(4)'s statute of limitations). If a prior conviction is vacated, then the District Court's original guideline enhancement and its § 3553(a) analysis were based at least in part on incorrect factual information that would appear to be of a constitutional magnitude. *See Townsend v. Burke*, 334 U.S. 736, 741 (1948) (holding that it violates due process for a defendant who was not represented by counsel to be sentenced based on "assumptions concerning his criminal record which were materially untrue."); *United States*

v. Tucker, 404 U.S. 443, 447 (1972) (ordering resentencing where the sentence was "founded at least in part upon misinformation of constitutional magnitude" because it was based on prior convictions that were imposed in cases in which the defendant was not represented by counsel); *cf. Custis v. United States*, 511 U.S. 485 (1994).

But cases involving a *Begay* challenge are very different. In those situations, it is only the legal interpretation of the guideline that has changed. The current (or prior) conviction used to enhance the sentence is still a valid part of the defendant's criminal history. *See Nichols v. United States*, 75 F.3d 1137 (7th Cir. 1995) (distinguishing between non-cognizable challenges to the court's application of the Sentencing Guidelines and due process violations where sentence was imposed based on inaccurate information). Furthermore, the facts underlying the current (or prior) conviction, which the Court considered when it performed its § 3553(a) analysis, remain unchanged. The significance of this distinction becomes even clearer when you look at the facts of this case. Here, Beckles' possession of the sawed off shotgun remains the same. The only thing that has changed is the classification of that offense as a "crime of violence" under the Sentencing Guidelines. Any misapplication of the career offender guideline in this case does not rise to the level of a constitutional defect and, as shown below, Beckles cannot show that application of the career offender guideline in this case is a fundamental defect resulting in a complete miscarriage of justice.

Beckles was sentenced under the post-*Booker*[4] advisory Sentencing Guidelines scheme.[5] It is undisputed that Beckles has three previous convictions for a serious drug offense and qualifies as an armed career criminal. (Civ. DE 1, at 2, 10) Therefore, Beckles' statutory sentencing range was fifteen years to life imprisonment. While the Court was required to correctly calculate and consider the applicable guideline range, having done so it had the discretion to sentence Beckles outside the range, if it found that a non-guideline sentence was reasonable in light of the factors set forth in 18 U.S.C. § 3553(a). *See United States v. Crawford*, 407 F.3d 1174, 1179 (11th Cir. 2005).

In the post-*Booker* era, a district court's error in the determination of a defendant's sentencing guidelines range cannot constitute a "fundamental defect" rendering a sentence "a complete miscarriage of justice" because, when sentencing a defendant under advisory guidelines, the district court may impose any sentence up to the statutory maximum, whether within or outside of the guideline range, so long as the sentence is reasonable. See *United States v. Williams*, 435 F.3d 1350, 1355 (11th Cir. 2006) (district court did not act unreasonably by disregarding career offender guideline when imposing defendant's post-*Booker* sentence).

Beckles filed a sentencing memorandum with the court acknowledging that his guideline range was 360

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[4] *United States v. Booker*, 543 U.S. 220 (2005).

[5] Beckles' sentencing hearing was held on October 17, 2007.

months to life imprisonment, but requesting the court use its sentencing discretion post-*Booker* and sentence him to the statutory mandatory minimum sentence of 180 months imprisonment (DE 55). The defendant filed an addendum to his sentencing memorandum citing *Williams*, 435 F.3d 1350 (11th Cir. 2006), as persuasive authority for the court to vary downward in his case (DE 57). In *Williams*, the Eleventh Circuit affirmed a substantial downward variance from the career offender guideline.

Beckles claimed that his case was "very similar" to the *Williams* case (DE 57, at 1). In *Williams*, the PSI applied the career offender enhancement based on the defendant's prior convictions for possession of cocaine with intent to sell or deliver and carrying a concealed firearm. The defendant argued that his prior conviction for carrying a concealed firearm was not a crime of violence and that *United States v. Gilbert*, 138 F.3d 1371 (11th Cir. 1998), should not apply to his situation. He also urged the District Court to take a more individualized approach to his sentence, as permitted by *Booker*. *Williams*, 435 F.3d at 1352.

The district court found that *Gilbert* applied, and calculated the defendant's guideline range based on the career offender provision, USSG 4B1.1. The resulting guideline range was 188 to 235 months in prison. The court then applied the Section 3553(a) factors and determined that the guideline range would produce an unjust sentence under the facts of the case and instead imposed a sentence of 90 months' imprisonment. *Williams*, 435 F.3d at 1353. The government appealed,

arguing that the district court had "effectively ignored" *Gilbert*, which held that carrying a concealed firearm is a crime of violence requiring application of the career offender enhancement. The Eleventh Circuit disagreed. The Court found that the district court had properly applied the Guidelines and then acted within in its discretion in finding that under § 3553(a) the guideline range was too high. The Eleventh Circuit also found that the 90-month sentence imposed by the court, which was 98 months lower than the low-end of the guideline range and 145 months lower than the high-end of the range, was reasonable. *Williams*, 435 F.3d at 1354-55.

In this case, Beckles argued that just like in *Williams* the career offender guideline range was unjust given the facts of his case. At the sentencing hearing, Beckles requested a downward variance to the statutory mandatory minimum sentence stating:

> Your Honor, under 18 3553, is free to consider the Guidelines as one factor, but you don't have to give it any more weight than any other factor, and if you look at the other factors, his prior record and the way this crime was committed, we're asking Your Honor not to impose a sentence of 30 years to life. We're asking Your Honor to impose the minimum sentence that you can . which is the 15 year minimum mandatory.

(DE 75). The district court understood its discretion to vary, but declined to do so, based on the seriousness of Beckles' offense and the extensiveness of his criminal history (*Id.* at 43). The district court commented on the repeated leniency the defendant received in his eighteen previous convictions (*Id.* at 40-43). The district court remarked that this defendant received "too many passes and, perhaps, that sent the wrong message to [Beckles]." (*Id.* at 41). In deciding what sentence to impose, the district court stated, "I have given careful consideration to the statutory factors in 18 U.S. Code §3553. I am mindful of the need to have this sentence reflect upon the seriousness of the offense, provide deterrence and safeguard the community from you, Mr. Beckles, because you have shown that you cannot live within the law." (*Id.* 43:4:9). The district court then imposed a sentence at the bottom of the guideline range, which resulted in a total sentence of 360 months' imprisonment, which was well below the statutory maximum sentence of life imprisonment.

It is clear that where, as in this case, the claimed defect is not constitutional, does not involve a lack of jurisdiction, and does not relate to a sentence that exceeds the statutory maximum, Section 2255 relief can only occur where a fundamental defect leads to a complete miscarriage of justice. *Davis v. United States*, 417 U.S. 333, 346 (1974) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). *See also Reed v. Farley*, 512 U.S. 339, 348-52 (1994); *United States v. Addonizio*, 442 U.S.

178, 184 n.11, 185 (1979); *Burke v. United States*, 152 F.3d 1329 (11th Cir. 1998). Beckles concedes in his Motion to Vacate that given his extensive criminal history his Guideline range even without the career offender enhancement would result in a range of 263-327 months (Civ. DE 1, at 10). Thus, the 360 months sentence he received in this case was only 33 months above the "correct" guideline range. Hardly a defect leading to a "complete miscarriage of justice." Beckles simply cannot meet that high standard in light of the advisory nature of the Sentencing Guidelines and the Court's thorough and thoughtful analysis of the § 3553(a) factors at the time of sentencing. Therefore, his Guidelines challenge is not cognizable under 28 U.S.C. § 2255.

IV. CONCLUSION

For the reasons set forth above, it is respectfully submitted that Beckles' motion for collateral relief under Title 28, United States Code, Section 2255, is without merit, and should be denied without an evidentiary hearing. *See United States v. Laetividal-Gonzalez*, 939 F.2d 1455, 1456 (11th Cir. 1991) (where motion can be resolved solely on the basis of the pleadings, an evidentiary hearing is unnecessary); *Vick v.*

United States, 730 F.2d 707, 708 (11th Cir. 1984) (same).

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-23517-CIV-ALTONAGA/BROWN
(Criminal Case No. 07-20305-CR-ALTONAGA)

TRAVIS BECKLES,

Movant,

v.

UNITED STATES
OF AMERICA,

Respondent. /

MOVANT'S REPLY TO UNITED STATES' RESPONSE TO MOTION TO VACATE SENTENCE

(Entered Dec. 16, 2010)

Movant. Travis Beckles, by and through undersigned counsel, hereby replies to the United States' Response to Movant's Motion to Vacate Sentence Pursuant to Title 28 U.S.C. § 2255 ("Response"), Civ. DE 8. and in support thereof states as follows:

In its Response, the Government does not dispute that Mr. Beckles should not have been sentenced as a career offender. Indeed, the Government cannot make such an argument in light of the decisions in *Begay v. United States*, 128 S. Ct. 1581 (2008), *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008), and *United States v. McGill*, 618 F.3d 1273 (11th Cir. 2010). Rather, the Government argues that Mr. Beckles's claim is not cognizable in a proceeding under 28 U.S.C. § 2255. Civ. DE 8 at 4-12. A challenge to a sentence is "cognizable"

under section 2255 if that sentence was imposed "in violation of the Constitution or laws of the United States." § 2255(a). Notwithstanding the Government's arguments to the contrary, Mr. Beckles's sentencing challenge is cognizable on both such grounds here.

A. The Sentence was Imposed in Violation of the Constitution.

The government first asserts that Mr. Beckles's claim is not cognizable because it "is not constitutional." Civ. DE 8 at 5. Both the Supreme Court and the United States Court of Appeals for the Eleventh Circuit, however, have long held that a sentence is imposed in violation of due process, and redressable in habeas corpus, when it is based upon material misinformation. *See Townsend v. Burke*, 334 U.S. 736, 740-741 (1948); *United States v. Dean*, 752 F.2d 535, 544-45 (11th Cir. 1985); *Shukwit v. United States*, 973 F.2d 903 (11th Cir. 1992); *United States v. Tobias*, 662 F.2d 381, 388 (11th Cir. 1981). A sentence is "based upon" misinformation if "the sentence might have been different" in the absence of that information. *United States v. Tucker*, 404 U.S. 443, 448 (1972). Such is the case here.

In *Townsend*, the defendant sought habeas corpus relief on grounds that his sentence was based on materially false information as to his prior record – specifically, that his alleged prior convictions turned out to be dismissed charges, or those on which he had been found not guilty. 334 U.S. at 740, 68 S. Ct. at 1255. The

Supreme Court granted the writ, holding that because the defendant's sentence was premised on a foundation that was "materially false," it rendered the proceedings "lacking in due process, and the sentence "constitutionally invalid." *Id.* at 741, 68 S. Ct. at 1255.

In *Dean*, the Eleventh Circuit considered *Townsend* and numerous circuit court cases following it. *Dean*, 752 F.2d at 544. The court of appeals held that those cases stand for the proposition that a sentencing court cannot rely on "'false assumptions' about any 'material fact' without violating the due process clause.'" *Id.* at 544-545. A "material fact" includes such things as: the defendant's prior criminal record, *id.* at 545 (citing *inter alia, Townsend*, 334 U.S. at 740-41, 68 S. Ct. at 1255; *United States v. Malcolm*, 432 F.2d 809, 816 (2nd Cir. 1970); and *United States v. Espinoza*, 481 F.2d 553 (5th Cir. 1973)); the defendant's prior "illicit activities," *id.* (citing *United States v. Baylin*, 696 F.2d 1030 (3rd Cir. 1982)); the defendant's "intent to manufacture large quantities" of drugs, *id.* (citing *United States v. Tobias*, 662 F.2d 381, 388 (5th Cir. 1981)); and the defendant's prior dealings in narcotics, *id.* (citing *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971)).

In *Shukwit*, the Eleventh Circuit applied the principles articulated in *Townsend* and *Dean*. Mr. Shukwit filed a section 2255 motion in which he contended that "the PSI incorrectly labeled him a principal or a main distributor" of controlled substances when he committed the offense for which he was being sentenced, and that the district court's "reliance on the information denied him due process of law." 973 F.2d at 904. The

district court denied the motion, but the Eleventh Circuit reversed, holding that because "due process protects the right not to be sentenced on the basis of false information," the defendant's claim "is cognizable in this [section 2255] petition." *Id.*

The same is true here. Mr. Beckles's section 2255 motion alleges that the PSI incorrectly labeled him a career offender in reliance on the material misinformation that his offense qualified as a "crime of violence," and that his sentence would have been different in the absence of this information. In light of *Townsend*, *Dean*, and *Shukwit*, this states a due process claim and therefore is cognizable in a section 2255 proceeding.

In its Response, the government tries to limit *Townsend*'s reach to those cases where the material misinformation relied upon at sentencing related only to the validity of the defendant's prior conviction. Civ. DE 8 at 8. The *Begay* cases are "very different," the government argues, because "it is only the legal interpretation of the [career offender] guideline" that is at issue – that is, "[t]he only thing that has changed is the classification of [Mr. Beckles's offense] as a 'crime of violence' under the Sentencing Guidelines." *Id.* But as is demonstrated by *Shukwit* and *Tobias* (which was cited with approval in *Dean)*, the Eleventh Circuit has not limited *Townsend* and its progeny in the manner postulated by the government.

Shukwit did not involve an invalid prior conviction. Rather, the movant there argued that he had been

improperly sentenced because the district court incorrectly classified him as a "main" or "principal" participant in the offense. Nonetheless, the Eleventh Circuit found that this stated a claim for a violation of due process that is cognizable in a section 2255 proceeding. *See Shukwit*, 973 F.2d at 904. *Tobias* goes even farther. There, the Eleventh Circuit found that due process was violated, and resentencing was required, when the district court relied upon "incorrect assumptions from the evidence" to conclude that defendant intended to manufacture large quantities of illegal drugs when he committed the offense for which he was being sentenced. 662 F.2d at 388. This conclusion had nothing to do with any prior convictions suffered by Mr. Tobias, and yet a constitutional violation was found.

Here, Mr. Beckles claims that he was improperly sentenced because he was incorrectly classified as a "career offender" based on the incorrect assumption that his conviction for possession of a sawed-off shotgun was a "crime of violence." As such, the due process violation is the same as in *Townsend, Shukwit, Tobias*, and the myriad cases cited in *Dean*. This claim is therefore cognizable in a section 2255 proceeding.

B. The Sentence was Imposed in Violation of the Laws of the United States.

Even assuming, *arguendo*, that the *Begay/Archer/McGill* error here is "non-constitutional" in nature, it was still cognizable in a section 2255 proceeding as a

"violation of the laws of the United States" because it involves an intervening change in the substantive law.

In *Davis v. United States*, 417 U.S. 333 (1974), the Supreme Court rejected the suggestion that only constitutional or jurisdictional claims are cognizable in section 2255 actions. The Court held that even where a petitioner's claim is not of "constitutional dimension," it is cognizable if based on an intervening change in the substantive criminal law that occurred after his conviction and sentence. *See id.* at 345.

Mr. Beckles agrees with the government that not every asserted error of law is cognizable in a section 2255 proceeding. *See* Civ. DE 8 at 5-6. The "appropriate inquiry" is whether the error of law amounts to a "fundamental defect which inherently results in a complete miscarriage of justice," presenting "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Id.* at 346 (citing *Hill v. United States*, 368 U.S. 424, 428 (1962)). For this reason, "technical," non-prejudicial violations of the formal requirements of "procedural" rules afford no basis for section 2255 relief. *See United States v. Timmreck*, 441 U.S. 780, 784-85 (1979); *Hill*, 368 U.S. at 426-30.

In *Davis*, the movant sought section 2255 relief based on an intervening change in the substantive criminal law – that is, that the decision in *Gutknecht v. United States*, 396 U.S. 295 (1970), established that his induction order was invalid *ab initio* under the Selective Services Act and that, as a result, his conviction

and sentence for the failure to comply with that order were unlawful. The Supreme Court held that the movant's claim was cognizable in section 2255: "There can be no room for doubt," the Supreme Court held, that "such a circumstance 'inherently results in a complete miscarriage of justice' and 'present(s) exceptional circumstances that justify collateral relief under § 2255." *Davis*, 417 U.S. at 346-47

The Supreme Court has since recognized that relief was warranted in *Davis* because it involved intervening change in the substantive, rather than procedural, law. *See United States v. Addonizio*, 442 U.S. 178, 188 (1979); *Bousley v. United States*, 523 U.S. 614, 620 (1998). A rule of law is "substantive" when it either "forbid[s] punishment of certain primary conduct," or "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense." *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)). *Davis* falls into the former category, in that it involved "a change in the substantive law that established that the conduct for which petitioner had been convicted and sentenced was lawful." *Addonizio*, 442 U.S. at 186-87.

Similarly, *Begay* and its progeny do not address the accuracy of the process afforded the defendant. Rather, they involve a change [sic] the law that narrowed the category of defendants who could receive additional punishment as a career offender or an armed career criminal. These cases therefore fall directly within the second category [sic] substantive rules articulated

in *O'Dell* – those that prohibit a certain category of punishment for a class of defendants because of their status or offense. *See Welch v. United States*, 604 F.3d 408, 415-16 (7th Cir. 2010) (concluding *Begay* was a "substantive" decision); *United States v. Shipp*, 589 F.3d 1084, 1090-91 (10th Cir. 2009) (concluding that *Chambers v. United States*, 555 U.S. 122 (2009), was a "substantive"decision).

Accordingly, the *Begay* error that resulted in Mr. Beckles's sentencing as a career offender was not merely a technical violation of a procedural rule, but rather an intervening change in the substantive law. Therefore, as in *Davis*, it involved a fundamental miscarriage of justice that is cognizable in a section 2255 proceeding, and is distinguishable from the non-fundamental procedural errors found non-cognizable in *Hill* and *Timmreck*. *Compare Shukwit*, 973 F.2d at 905 (recognizing that an intervening decision interpreting the terms of a federal sentencing statute – specifically, the Supreme Court's decision in *Gozlon-Peretz v. United States*, 498 U.S. 395, 111 S. Ct. 840 (1991) – provided grounds for section 2255 relief; even though the district court's judgment imposing special parole was correct under circuit law in effect at the time, after *Gozlon-Peretz*, the district court on remand should correct petitioner's sentence to reflect supervised release rather than special parole), *with Burke v. United States*, 152 F.3d 1329 (11th Cir. 1998) (holding, because clarifying amendment to obstruction of justice provision of federal sentencing guidelines "effect[ed] no change in the substantive law," it was not cognizable

in section 2255 because there was no "miscarriage of justice").

Finally, the government argues that because the 360-month sentence Mr. Beckles received is "only 33 months above the 'correct' guideline range" this is "[h]ardly a defect leading to a 'complete miscarriage of justice.'" Civ. DE 8 at 12. Mr. Beckles strenuously disagrees. As the Supreme Court held in *Glover v. United States*, 531 U.S. 198, 203 (2001), "any amount of actual jail time" – there, a 15-month increase in the movant's sentence – has constitutional significance. In light of the subsequent change in the law pursuant to which it is now beyond peradventure that Mr. Beckles was wrongly sentenced to additional jail time as a career offender, "[t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'presents exceptional circumstances' that justify collateral relief under § 2255." *Davis*, 417 U.S. at 346-47.

CONCLUSION

Based upon the foregoing argument and citations of authority, Movant Travis Beckles respectfully requests that this Court grant his motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255, and resentence him without the career offender enhancement.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-23517-CIV-ALTONAGA/SIMONTON

TRAVIS BECKLES,

Movant,

vs.

UNITED STATES
OF AMERICA,

Respondent. /

REPORT AND RECOMMENDATION ON MOTION TO VACATE PURSUANT TO 28 U.S.C. § 2255

(Entered Dec. 17, 2012)

Movant Travis Beckles has filed a Motion to Vacate pursuant to 28 U.S.C. § 2255 attacking his federal sentence in Case No. 07-20305-CR-ALTONAGA (S.D. Fla. 2009) (DE # 1). The Government timely filed a Response to the Motion (DE # 8) and the Movant filed a Reply (DE # 9). The Motion was referred to the undersigned Magistrate Judge by the Honorable Cecilia M. Altonaga, United States District Judge (DE # 16). The Parties have also submitted Supplemental Briefs on the Motion (DE ## 19, 20), and an oral argument was held before the undersigned. For the following reasons, the undersigned recommends that the Motion to Vacate be **DENIED**.

I. INTRODUCTION

The Movant in the case at bar challenges the sentence he received following his conviction for being a felon in possession of a firearm. The basis for his challenge is that he was incorrectly classified as a career offender under the Sentencing Guidelines. The crux of the Movant's argument is that in determining career offender status under U.S.S.G. § 4B1.1, the Court improperly considered possession of a sawed-off shotgun to be a crime of violence, contrary to the holdings in *Begay v. United States*, 533 U.S. 137 (2008); *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008); and *United States v. McGill*, 618 F. 3d 1273 (11th Cir. 2010), which were decided after the imposition of his sentence. The Government opposes relief in this case solely on the grounds that a challenge to the determination of a sentencing guideline range is not cognizable in a Motion brought pursuant to 28 U.S.C. § 2255.[1]

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[1] Due to Government's singular challenge to the Movant's Motion based upon cognizablity, the undersigned does not address defenses and/or issues that might normally be presented to the Court during the briefing of a § 2255 Motion.

Specifically, in its initial response to the § 2255 Motion, the Government conceded that the issue in this case was raised on direct appeal and thus did not argue that the Movant had procedurally defaulted his claim. However, in a supplemental response and at oral argument, the Government suggested that the Court could *sua sponte* find a procedural default since the issue was not presented to the trial court and the Court of Appeals addressed the issue under a plain error standard of review. However, as discussed *infra* the undersigned declines the Defendant's request to *sua sponte* entertain this issue.

The Government also has not challenged the retroactive application of *Begay*. Thus, this Report and Recommendation does not discuss the retroactive application of *Begay* in the context of this case. *See Gilbert v. United States*, 609 F.3d 1159, 1165 (11th Cir. 2010) (accepting Government's concession of retroactivity of *Begay* and *Archer*) (vacated on other grounds, 640 F.3d 193 (11th Cir. 2011) (en banc)).

Moreover, the Government in opposition to the Motion did not contend that the career offender guideline was properly applied. However, at oral argument, the Government, for the first time, asserted that if Mr. Beckles were granted relief pursuant to § 2255, the Government intended to argue at the resentencing that Mr. Beckles still qualified as a career offender under the federal sentencing guidelines. Specifically, the Government stated its position that, although pursuant to the holdings in *Begay*, *Archer* and *McGill*, the offense of being a felon in possession of a firearm did not qualify as a crime of violence under the Armed Career Criminal Act ("ACCA"), Sentencing Guideline Application Note 1 to U.S.S.G. § 4B1.2 expressly lists possession of a sawed-off shotgun as a crime of violence, and this Guideline provision controls the instant case. According to the Government, Mr. Beckles, therefore, was properly treated by the sentencing court as a career offender. Even at oral argument, however, the Government did not assert this position as a basis for denying the Motion to Vacate, relying instead on its cognizability argument. The Government first mentioned this position in response to the Court's question regarding whether it conceded that, if Mr. Beckles' claim was cognizable, there is a reasonable probability that he would receive a lower sentence. The undersigned therefore does not address that issue herein.

The Government conceded at oral argument that there is a reasonable probability that if Mr. Beckles is re-sentenced without the application of the career offender enhancement, he would receive a lesser sentence. This concession is based upon the fact that when the sentence originally imposed upon Mr. Beckles was reduced based upon his substantial assistance to the Government, the Court imposed a 40% reduction to Mr. Beckles' sentence. Thus, the Government conceded that there is a reasonable

As discussed in more detail below, the Eleventh Circuit Court of Appeals has never directly addressed the cognizability under § 2255 of challenges to the applicability of the career offender guideline. In cases where the issue has been presented, the Court has relied instead upon alternative bases for denying relief, although the language used by the Court foreshadows denial of relief under the circumstances presented in the case at bar. Thus, based upon the case law and the arguments properly raised by the Parties, the issue before the Court is a narrow one – whether a defendant may obtain relief pursuant to 28 U.S.C. § 2255 where his advisory sentencing guideline range was incorrectly enhanced using the career offender guideline, he preserved the error for review on direct appeal, has timely filed his first Motion to Vacate pursuant to 28 U.S.C. § 2255, and there is a reasonable probability that he received a greater sentence than he would have received if his guideline range had been properly calculated; but the sentence imposed after giving him credit for providing substantial assistance to the government was below the unenhanced guideline range applicable to non-career offenders. After a thorough review of the facts of this case, the undersigned concludes that this determination is a close call, but based upon the rationale of the Eleventh Circuit Court of Appeals in various analogous cases discussed below,

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probability that the Court would impose the same percentage reduction to a newly calculated guideline range, and this would result in a lesser sentence. The undersigned therefore accepts that assumption as true for purposes of this Report and Recommendation.

the undersigned is constrained to conclude that Mr. Beckles' claim is not cognizable under § 2255 since he cannot establish the miscarriage of justice that is required to obtain relief from a non-constitutional error.

II. BACKGROUND

The facts of this case are relatively straightforward. On April 24, 2007, Movant Travis Beckles was charged in a one-count indictment with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g) (Cr. DE # 6).[2] On August 2, 2007, the jury convicted Mr. Beckles of this offense (Cr. DE ## 41, 42). A Pre-sentence Investigation Report (PSI) was prepared which recommended, *inter alia*, that Mr. Beckles be sentenced as a career offender pursuant to Sections 4B1.1 and 4B1.4 of the United States Sentencing Guidelines ("U.S.S.G." or "sentencing guidelines") since "[Mr. Beckles] was at least 18 years old at the time of the instant offense, the instant offense was a felony crime of violence, and because [he] has at least two prior felony convictions of a controlled substance offense" (DE # 1 at 2, quoting PSI ¶ 18).[3] The PSI also

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[2] References to the documents contained in the Criminal Docket in the Report and Recommendation are designated as (Cr. DE # ___).

[3] The United States Federal Sentencing Guidelines § 4B1.1. entitled "Career Offender" provides,

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance

recommended that Mr. Beckles be sentenced as an armed career criminal pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e) due to his three prior convictions for controlled substance offenses (DE # 1 at 2).[4]

Based upon the enhancements, the PSI calculated Mr. Beckles' adjusted offense level at 37 and calculated Mr. Beckles' criminal history category at a level VI pursuant to U.S.S.G. § 4B1.1(b) (DE # 1 at 2, citing PSI ¶ 41). Based on those calculations, therefore, Mr. Beckles' sentencing guideline range was 360 months to life (DE # 1 at 2, citing PSI ¶ 79). Based upon the applicability of the career offender guideline, Mr. Beckles was sentenced to 360 months of imprisonment (Cr. DE # 69 at 2).

It is not disputed that absent the career offender enhancement, Mr. Beckles' adjusted offense level would have been 34 and his criminal history category would have been level VI. 26 U.S.C. § 5845(a); U.S.S.G. §§ 4B1.4(b)(3)(A), 4B1.4(c)(2). In addition, without the career offender enhancement, Mr. Beckles' guideline

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offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

[4] The "Armed Career Criminal Act" (ACCA), 18 U.S.C. § 924(e)(1) provides for a minimum fifteen-year sentence for persons convicted of violating 18 U.S.C. § 922(g), which makes it a crime to be a felon in possession of a firearm, if that person has three previous convictions for a violent felony or a serious drug offense, or both.

sentencing range would have been between 262 and 327 months. U.S.S.G. § 5A. (DE # 1 at 10).

Mr. Beckles timely appealed his sentence, arguing, among other things, that because his conviction for being a felon in possession of a firearm was not a crime of violence, he was wrongfully sentenced as a career offender. While Mr. Beckles' case was on appeal, and after briefing was completed, the United States Supreme Court decided *Begay v. United States*, 533 U.S. 137 (2008), which narrowed the definition of what constituted a violent felony under the Armed Career Criminal Act; and, the Eleventh Circuit decided *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008), which held that the definition of "violent felony" for purposes of the Armed Career Criminal Act is "virtually identical" to the definition of a crime of violence for purposes of the career offender guideline enhancement, and that the crime of carrying a concealed firearm is not a crime of violence.

The Eleventh Circuit affirmed Mr. Beckles' conviction and sentence, holding that possession of a sawed-off shotgun was a crime of violence within the meaning of U.S.S.G. § 4B1.1 (Cr. DE # 121). The opinion of the Court did not mention either *Begay* or *Archer*, although it was filed on April 17, 2009, after those cases had been decided.[5] Mr. Beckles petitioned the Supreme

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[5] It appears that those cases were brought to the Court's attention through notices of supplemental authority, but the Government has not argued that relief in this case is precluded on the grounds that § 2255 may not be used to relitigate matters decided

Court for a writ of certiorari, which was denied on October 5, 2009. *Beckles v. United States*, 130 S.Ct. 272 (Cr. DE # 132).

On April 7, 2010, the government filed a motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure (Cr. DE # 133 at 1-2), which was granted. Although the Government sought a reduction of only 20%, the Court reduced Mr. Beckles' sentence by 40 percent, to 216 months' imprisonment instead of the 360 months that he initially received (DE # 18; Cr. DE # 150).

On September 30, 2010, the Movant timely filed the instant Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 (DE # 1).

The Government filed a response to the Motion to Vacate (DE # 8), and the Movant filed a Reply (DE # 9). The action was stayed however, pending the outcome of the Eleventh Circuit's en banc rehearing in the matter of *Gilbert v. United States*, 625 F.3d 716 (11th Cir. 2010), a case which addressed, among other things, whether a defendant who had been sentenced as a career offender pursuant to the United States Sentencing Guidelines, was entitled to § 2255 relief, after one of the convictions which was relied upon for the career offender enhancement was later determined not to be a "crime of violence" (DE # 10). After the Eleventh Circuit issued its en banc opinion in *Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011), the matter was

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on direct appeal. *Davis v. United States*, 417 U.S. 333, 346-47 (1974). (DE # 1 at 3).

referred to the undersigned, and the Parties were directed to file supplemental briefs in light of the *Gilbert* en banc opinion (DE # 17).[6] The Movant filed his Supplemental Brief (DE # 17), the Government responded (DE # 20), and the Movant filed a Reply (DE # 24).

On March 9, 2012, the undersigned held oral argument on the Motion to Vacate (DE # 26).

III. THE POSITIONS OF THE PARTIES

In the Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255, Mr. Beckles contends that he is entitled to have his sentence vacated because the crime for which he was convicted and sentenced, possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1), is no longer considered a crime of violence for purposes of applying a career offender enhancement pursuant to §§ 4B1.1 and 4B1.2 of the United States Sentencing Guidelines (DE # 1). As such, the Movant contends that he should have been sentenced

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[6] Specifically, the undersigned directed the Parties to file supplemental briefs to address the following: a) The effect of the Eleventh Circuit's decision in *Gilbert* on the action at bar, including the effect, if any, of the Petition for Certiorari then pending before the Supreme Court; and, b) Whether a sentence imposing less than the statutory maximum, but based upon an incorrect calculation of the sentencing guidelines, may constitute a miscarriage of justice which is cognizable on a Motion to Vacate under 28 U.S.C. § 2255; and the effect on this determination if the sentence ultimately imposed as a result of a reduction is within the "correct" sentencing guideline range; as well as, whether this result is changed if the sentence is imposed under "advisory" rather than "mandatory" guidelines. (DE # 17).

under the guidelines only as an armed career criminal with a total offense level of 34 and a criminal history category of VI, which carries a guideline sentencing range of 262-327 months (DE # 1 at 10). The Movant contends that because he was improperly deemed a career offender, the sentencing Court misapplied the career offender enhancement and incorrectly calculated the total offense level of 37 and a criminal history of VI, for a guideline range of 360 months to life imprisonment, and sentenced him to 360 months. The Court later reduced his sentence by 40% to 216 months, based upon his substantial assistance to the Government. The Movant contends that if he had been sentenced under the correct guideline without the career offender enhancement and his sentence was then reduced by 40%, he would currently be serving a sentence between 180 and 196 months, which is well below the sentence he received.[7]

The Movant asserts that his sentence was imposed in violation of the Constitution and laws of the United States, and is therefore cognizable under § 2255 (DE # 9). He contends that his due process rights were violated because his sentence was based upon misinformation concerning his career offender status. Similarly, Mr. Beckles argues that the change in law regarding what constitutes a violent felony for

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[7] Although 40% of the lower end of the guideline range computed without the career offender enhancement is only 157 months, Mr. Beckles acknowledges that he was properly classified as an armed career criminal and is subject to a mandatory minimum sentence of 15 years (180 months) pursuant to 18 U.S.C. § 924(e) (DE # 1 at 10).

purposes of classifying a defendant as a career offender is a substantive change in the law, which resulted in a fundamental miscarriage of justice regarding his sentence since the incorrect law was applied to his sentence, and he therefore received a harsher sentence than he would have received had the correct law been applied. Finally, Mr. Beckles distinguishes those cases which have declined to consider challenges to sentencing guidelines determinations on collateral review, asserting that any need to foreclose review pursuant to § 2255 in the interests of finality does not apply to this case, where his claim was preserved on direct appeal, this is his first motion for relief under § 2255, and this motion was timely filed.

In its response to the Motion to Vacate, the Government concedes that Mr. Beckles' § 2255 Motion is timely. However, the Government contends that Mr. Beckles is not entitled to relief pursuant to § 2255 because the sentencing defect is not a constitutional claim, does not involve a lack of jurisdiction, does not relate to a sentence that exceeds the statutory maximum, does not lead to a complete miscarriage of justice, and is thus not cognizable under § 2255 (DE # 8 at 5). The Government asserts that challenges to the advisory sentencing guidelines are materially different than challenges to sentences that are in excess of the statutory maximum and different from cases where a prior conviction that served as the basis of an enhancement is vacated. The Government further contends that Mr. Beckles' statutory sentencing range as an armed career criminal was between fifteen years

and life imprisonment, and thus the sentence that Mr. Beckles received fell within the statutory range; and, the Government notes that the 360-month sentence that Mr. Beckles initially received "was only 33 months above the 'correct' guideline range." (DE # 8 at 12). Further, the Government emphasizes the difference in the scope of review for claims raised on direct appeal versus those raised in a collateral proceeding, and contends that an error that may justify reversal on appeal does not necessarily mean that the same issue is cognizable in the § 2255 context (DE # 20). In addition, the Government contends that the ruling of the Eleventh Circuit Court of Appeal in *Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1001 (2012), is relevant to this action because the reviewing Court in *Gilbert*, among other things, flatly rejected the movant's claim that his career offender enhancement at sentencing constituted a miscarriage of justice because he was actually innocent of being a career offender; and further, because the Court made clear that a challenge to a misapplied guideline does not rise to a constitutional violation. The Government argues that the holding in *Gilbert* emphasizes the need for finality in criminal actions and the inapplicability of § 2255 to guideline calculation errors.

The Government also, in essence, asserts that because the federal sentencing guidelines are now advisory, a miscarriage of justice may not be based upon the misapplication of the career offender guideline (DE # 20 at 13-14). Further, the Government contends that because Mr. Beckles' sentence falls within the

statutory limits, a sentence that exceeds a particular guideline range does not constitute a miscarriage of justice. The Government also contends that because the Court could impose the same sentence upon Mr. Beckles at resentencing, that sentence cannot be considered to be a fundamental defect in the proceedings so long as that sentence is reasonable. Finally, in a footnote, in its Supplemental Response the Government argues that the Movant procedurally defaulted on the sentencing issue by failing to raise the claim before the District Court at sentencing (DE # 20 at 12 n.7). The Government states, however, that the Government inadvertently failed to raise this issue in its initial response to the Movant's Motion and thus concedes that it waived the procedural default argument. The Government therefore urges the Court to *sua sponte* invoke the procedural bar to this action.

IV LEGAL FRAMEWORK

Title 28 United States Code, section 2255, entitled "Federal custody; remedies on motion attacking sentence" provides, *inter alia,*

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by

> law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Thus, § 2255 "does not encompass all claimed errors in conviction and sentencing." *United States v. Addonizio*, 442 U.S. 178, 185 (1979). Rather, a federal prisoner may file a § 2255 motion if the movant claims that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a).

The Supreme Court has made clear that an error of law provides a basis for collateral attack only when "the claimed error constitute[s] a fundamental defect which inherently results in a complete miscarriage of justice." *Addonizio*, 442 U.S. at 185; *accord Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) ("relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice") (internal quotation marks and citations omitted). A non-constitutional error that may justify reversal on direct appeal does not generally support a collateral attack on a final judgment, unless the error (1) could not have been raised on direct appeal and (2) would, if condoned, result in a complete miscarriage of justice. *Lynn*, 365 F.3d at 1233

(citations omitted). A non-constitutional error that results in a miscarriage of justice "should present exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Hill v. United States*, 368 U.S. 424, 428 (1962) (quotation omitted). Errors that seriously undermine the validity of criminal proceedings have been held to constitute a miscarriage of justice. *See, e.g.*, *Davis v. United States*, 417 U.S. 333, 346-47 (1974) (holding that a prisoner's claim that he was convicted for a legal act was cognizable under § 2255); *United States v. Behrens*, 375 U.S. 162 (1963) (holding that prisoner was entitled to relief under § 2255 where his sentence was imposed outside of the prisoner's or counsel's presence); *Ayuso v. United States*, 361 Fed. App'x 988, 991 (11th Cir. 2010) (distinguishing guideline miscalculation sentencing claims from errors that constitute a miscarriage of justice which implicate a fundamental defect in the validity of the district court proceedings).

V ANALYSIS[8]

A. The Motion to Vacate pursuant to § 2255 is Timely

The Government concedes that Mr. Beckles' Motion to Vacate is timely, and the undersigned agrees with that concession. Pursuant to Title 28, United States Code, Section 2255(f)(1), a Motion to Vacate is timely if it is filed within one year from the date the conviction becomes final. When a defendant files a petition for a writ of certiorari with the Supreme Court following a direct appeal, the conviction becomes final when the Supreme Court either denies certiorari or

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[8] As stated previously, the undersigned has not analyzed the issues which the Government has "mentioned" in the course of proceedings, but not relied on in presenting its opposition. Specifically, the Government has not challenged the retroactive applicability on collateral review of the holdings in *Begay* or *Archer* regarding what constitutes a crime of violence, or that these decisions control the interpretation of the career offender provision of the Sentencing Guidelines in the context of this Motion to Vacate. In addition, the undersigned declines to engage in the Government's suggestion that the Court *sua sponte* determine that the Movants' claims are procedurally defaulted because the Movant did not present the career offender enhancement argument to the District Court. It is undisputed that the Movant raised such arguments on direct appeal and the Eleventh Circuit considered the merits of the arguments, and thus the Movant has satisfied the requirement that collateral issues that are capable of being raised on direct appeal must be so raised. Under the procedural default rule, "a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding." *Lynn*, 365 F.3d at 1234. In addition, the Government has waived this argument by failing to raise it in its initial response to the Motion to Vacate.

issues a decision on the merits. *Washington v. United States*, 243 F.3d 1299, 1300-01 (11th Cir. 2001). In this case, the Supreme Court denied Mr. Beckles' petition for a writ of certiorari on October 22, 2009, and the one-year statute of limitations began to run the day after that denial. Thus, because Mr. Beckles filed his Motion to Vacate on September 30, 2010, his Motion to Vacate is timely.

B. Mr. Beckles' § 2255 Non-Constitutional Claim is not Cognizable on Collateral Review as His Sentence Does Not Constitute a Fundamental Defect Resulting in a Miscarriage of Justice

1. Mr. Beckles' [sic] Has Not Raised a Cognizable Claim Pursuant to the United States Constitution or the Laws of the United States

The Eleventh Circuit has stated that, as a threshold matter, a court examining a motion to vacate a sentence must determine whether the claim is cognizable. *Burke v. United States*, 152 F.3d 1329, 1331 (11th Cir. 1998); *Ayuso v. United States*, 361 Fed. App'x 988 (11th Cir. 2010). By the plain language of 18 [sic] U.S.C. § 2255, claims raised in a motion to vacate which assert that a sentence is imposed in violation of the Constitution or in violation of the laws of the United States are cognizable upon collateral review.

In the instant case, the Movant argues that his sentence was imposed in violation of the Constitution

(DE # 9 at 2).[9] Specifically, the Movant asserts that his constitutional due process rights were violated when the Court misapplied the guidelines. However, that argument has been rejected by the Eleventh Circuit. In *Gilbert v. United States*, the Eleventh Circuit Court of Appeals, sitting en banc stated,

> Gilbert's claim that a sentencing guidelines provision was misapplied to him is not a constitutional claim. If it were, every guidelines error would be a constitutional violation. However prescient the Founders may have been in other respects, they did not think to incorporate the sentencing guidelines into the Constitution or Bill of Rights. Nor is it plausible to suggest, as Gilbert does, that every error adversely affecting a defendant's sentence violates the Due Process Clause. Sometimes a cigar is just a cigar, and sometimes an error is just an error.

640 F. 3d at 1321-22. Further, the cases cited by the Movant to support his claim that his constitutional due process rights were violated are distinguishable from the case at bar because those cases involved a sentencing court's misapprehension of certain underlying facts related to a defendant's conviction. In *Townsend*

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[9] In the Motion to Vacate, Mr. Beckles did not address the issue of cognizability under § 2255 but rather only argued that his sentence should be set aside due to the rulings in *Begay* and *Archer* which concluded that a felon in possession of a firearm did not constitute a crime of violence. When the Government in response to the Motion raised the issue of cognizability, Mr. Beckles addressed the issue for the first time in his Reply.

v. Burke, 334 U.S. 736 (1948), the Supreme Court stated that a trial court violates the constitutional right to due process when it relies on "extensively and materially false" information, which the defendant had no opportunity to correct through counsel. There is no dispute that Mr. Beckles was represented by counsel and given an opportunity to challenge the district court's factual determinations with regard to his sentence. Similarly, in *Shukwit v. United States*, 973 F. 2d 903 (11th Cir. 1992), the movant raised a factual objection to a misstatement in the PSI regarding whether the defendant was a "principal" or "main distributor" of controlled substances. In finding that the defendant was entitled to § 2255 relief, the Court opined that a defendant has the right to not be sentenced on the basis of false information, which clearly is a different issue than the issue raised in this case – whether a change in definition under the guidelines raises a cognizable issue under § 2255. Further, the court in *United States v. Dean*, 752 F. 2d 535 (11th Cir. 1985), considered whether a sentence predicated upon the sentencing Court's mistaken assumption about the length of time that the defendant would serve in prison prior to parole violated the defendant's due process rights and would entitle a defendant to collateral relief.[10] In this case, the sentencing Court did not sentence Mr. Beckles based upon factual inaccuracies,

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[10] Notably, the Court in *Dean* concluded that the "mistake" by the sentencing court regarding the length of time the defendant would serve did *not* render the sentence illegal and did not violate the defendant's constitutional due process rights. *Id.* at 543.

rather, Mr. Beckles challenges the Court's sentence based upon a purported legal error in the application of the guidelines. As stated above, *Gilbert* holds that such a challenge does not raise a constitutional issue. Thus, the Movant has failed to present a cognizable constitutional claim under the facts of this case.

Similarly, to the extent that the Movant argues that Mr. Beckles' sentence was imposed in violation of the laws of the United States, that argument fails, as well (DE # 9 at 4). First, it is undisputed that Mr. Beckles was sentenced within the statutory maximum for his conviction. Generally, when the sentence falls within the statutory range, it is not a cognizable constitutional issue in habeas proceedings. *Townsend v. Burke*, 334 U.S. 736, 741 (1948). In addition, in *Gilbert*, 640 F.3d at 1307-07 [sic], the Eleventh Circuit cited, with seeming approval, *Scott v. United States*, 997 F.2d 340, 341 (7th Cir. 1993), for the proposition that sentencing guidelines are not "laws" within the meaning of § 2255. It is for a similar reason that the Movant's reliance on *Davis v. United States*, 417 U.S. 333, 346 (1974), is misplaced. *Davis* examined the imposition of a sentence based upon a substantive change in the law which rendered the defendant's conduct no longer criminal and thus did not involve a purported misapplication of the guidelines, which again, are not laws. In this case, as discussed in greater detail below, there is no assertion that possession of a shot gun by a felon is not a crime. Thus, *Davis* is inapplicable. The Movant has therefore failed to point to any law of the United States that his sentence violated, and thus has failed to state a cognizable claim based upon such a violation.

2. Neither the Eleventh Circuit nor Courts in this District Have Held that a Career Offender Guideline Application Error Is Cognizable under § 2255

In the Eleventh Circuit, whether a challenge to a sentence based upon a misapplication of the guideline sentencing range, which does not exceed the statutory maximum penalty, is ever cognizable on collateral review remains an open issue.[11] Indeed, over the past few years, the Eleventh Circuit has consistently declined to determine whether a purported misapplication of a guideline range is cognizable on an initial § 2255 motion such as the one at bar. However, in order to place this matter into proper context, and to evaluate the cognizability of the Movant's claim, it is helpful to examine recent holdings in this circuit regarding § 2255 challenges to the application of the Federal Sentencing Guidelines.

In *Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011) (en banc), for example, the Eleventh Circuit examined whether a federal defendant who asserted that the district court had erroneously calculated his guideline sentence was entitled to relief pursuant to the savings clause contained in 28 U.S.C. § 2255(e).[12] In

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[11] As mentioned previously, in the Introduction, the Government has only properly challenged the Movant's Motion on the basis of whether Mr. Beckles raised a cognizable claim and not on the basis of procedural default or any other grounds.

[12] Section 2255(e) permits a federal prisoner to seek habeas corpus relief only if the remedy of filing a Motion to Vacate pursuant to § 2255(a) "is inadequate or ineffective to test the legality of his detention."

Gilbert, the defendant was sentenced as a career offender under § 4B1.1 of the Federal Sentencing Guidelines based on two prior convictions, one of which was carrying a concealed weapon, which was deemed at the time of his sentencing to be a "crime of violence." *Id.* at 1299. Although the defendant argued prior to his sentencing and on direct appeal that carrying a concealed weapon did not qualify as a crime of violence, he failed to raise that issue in his initial *pro se* § 2255 motion. *Id.* at 1301. Several years after his initial § 2255 motion was denied, Mr. Gilbert, through counsel, filed a motion seeking to amend his § 2255 motion to raise additional issues including challenging the application of the career offender enhancement to his sentence, in light of the Supreme Court's holding in *Begay* and the Eleventh Circuit's holding in *Archer*. The district court denied Mr. Gilbert's motion to amend concluding that the motion was actually a successive § 2255 motion barred by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). That determination was initially overturned by the Eleventh Circuit but subsequently was affirmed by the Eleventh Circuit en banc after a rehearing on the issue. Although the en banc Court in *Gilbert* characterized the primary question presented as "whether a federal prisoner can use a habeas corpus petition to challenge his sentence" and proceeded to answer that question in the negative where the sentence did not exceed the statutory maximum, the Court explicitly stated that it was not deciding whether a guideline misapplication claim based upon a change in the law could ever be brought in an initial § 2255 motion. *Id.* at 1306. Therefore, the Court was

not directly presented with the issue of whether Mr. Gilbert's claim may have been cognizable on his initial § 2255, but rather only determined that the savings clause of § 2255(e) which provides for relief pursuant to § 2241 under certain circumstances, may not be used to remedy a miscalculation of the sentencing guidelines where that issue may no longer be raised on a § 2255 motion. *Id.* at 1307.

Similarly, in *McKay v. United States*, 657 F.3d 1190 (11th Cir. 2011), the Eleventh Circuit declined to determine whether a defendant who asserted that he was improperly designated as a career offender pursuant to U.S.S.G. § 4B1.1 raised a cognizable § 2255 challenge. The movant argued to the district court that his sentence was illegal because, pursuant to the rulings in *Begay* and *Archer*, one of his prior convictions was no longer considered to be a crime of violence. The district court denied the movant's § 2255 motion based upon its determination that a claim of a misapplication of the guidelines was not cognizable under § 2255 absent a showing that the issue could not have been raised in direct appeal and if the court's failure to grant relief would result in a complete miscarriage of justice. *Id.* at 1195. Although the District Court denied the defendant's request for a Certificate of Appealability, the Eleventh Circuit granted the movant a Certificate of Appealability, framing the issue for appeal as follows, "Whether the district court erred in finding [McKay's] sentencing claim about the career-offender enhancement is not cognizable in proceedings under

28 U.S.C. § 2255, and, if cognizable, whether this sentencing claim is procedurally defaulted in any event." *Id.* at 1195. However, in its opinion on the § 2255 Motion, the Eleventh Circuit never reached the issue of cognizability but instead stated, "Because we hold that McKay's sentencing claim is procedurally defaulted and that the actual innocence exception does not apply to excuse his default, we leave for another day the question of whether this type of claim is cognizable under § 2255 in the first instance." *Id.* at 1195. *See also Orso v. United States*, 452 Fed. App'x 912, 913 n.4 (11th Cir. 2012) (assuming without deciding that movant raised cognizable § 2255 claim attacking sentence predicated on misapplication of federal sentencing guideline career offender enhancement, and then denying claim as procedurally defaulted); *Rivers v. United States*, 476 Fed. App'x, 848, 850 n.1 (11th Cir. May 21, 2012) (declining to determine whether § 2255 movant's claim that he was actually innocent of crime of violence under guidelines was cognizable, and instead denying relief because motion was procedurally defaulted).

While the Eleventh Circuit has not determined this exact issue but has rather denied § 2255 guideline sentencing claims on procedural grounds, the undersigned is aware that several other district courts have examined whether a movant challenging the application of the career offender guideline enhancement

raised a cognizable claim in an initial § 2255 motion.[13] In *Gonzalez v. United States*, No. 8:11-cr-1474-T-17EAJ, 2012 WL 279451, at *1 (M.D. Fla. Jan. 31, 2012), for example, a district court examined a motion to vacate pursuant to § 2255 which challenged the court's designation of the movant as a career offender at sentencing based upon a crime that was subsequently determined to not qualify as a crime of violence for purposes of the career offender enhancement. Although the Court determined that the Movant's motion was procedurally barred as untimely and due to his failure to raise the issue on direct appeal, the Court also determined that the claim was not cognizable in a § 2255 proceeding. In so doing, the Court first noted that neither the Supreme Court nor the Eleventh Circuit had ever held that an error in the application of the sentencing guidelines, that does not result in the imposition of a sentence that exceeds the statutory maximum for the offense of conviction, presents a constitutional claim. *Id.* at *5. The Court, therefore, concluded that the Movant had not identified a

[13] The undersigned is aware that in *Young v. United States*, 936 F.2d 533 (11th Cir. 1991), which the Movant cites in his Supplemental Brief (DE # 19 at 5), the Eleventh Circuit granted relief pursuant to a § 2255 Motion, where the movant sought to vacate his sentence which included a career offender enhancement under the guidelines. However, the Court in *Young* never addressed the cognizability issue and thus that opinion does not provide any direct guidance on the cognizability issue in this case. In addition, the undersigned notes that the Court's opinion was issued prior to the Eleventh Circuit's recent decisions in *Gilbert* and *McKay*. Notably, the Eleventh Circuit did not cite the *Young* decision for purposes of analyzing the scope of collateral relief in either of those cases.

constitutional claim which would normally be cognizable on a § 2255 challenge.

The Court then examined whether the movant had raised a claim that constituted a "fundamental defect which inherently resulted in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure." *Id.* at *5. In so doing, the Court observed that certain claimed errors, even if meritorious on direct appeal, are not cognizable in a § 2255 proceeding. *Id.*, *citing Lynn v. United States*, 365 F. 3d 1225 (11th Cir. 2004). In addition, the Court noted that neither the Supreme Court nor the Eleventh Circuit had held that an ordinary error in the application of the sentencing guidelines, even one that erroneously results in the application of the career offender guideline to increase a defendant's offense level significantly, constitutes the type of non-constitutional error that is cognizable in a § 2255 proceeding. Finally, the Court observed that the movant's sentence was well within the applicable statutory maximum term of imprisonment. The Court therefore concluded that the movant's sentence, viewed objectively, was not "illegal" or a "miscarriage of justice" because it conformed to the applicable penalty statute, did not exceed the statutory maximum, and could be reimposed even without the career offender enhancement. *Id.* at *6.

Similarly, in *Harris v. United States*, No. 8:11-CV-T-30TBM, 2011 WL 5834749, at *1 (M.D. Fla. Nov. 21, 2011), a district court opined that an initial § 2255 motion which challenged the application of the career

offender enhancement as improper because one of the underlying crimes upon which the enhancement was predicated was subsequently determined not to be a crime of violence, did not entitle the movant to relief because the motion was untimely. However, the Court noted that even if the motion to vacate had been timely, the movant still would not be entitled to relief because a challenge to a trial court's application of the sentencing guidelines is a non-constitutional issue that provides no basis for collateral relief. *Id.* at *3 (citing *Lynn v. United States*, 365 F.3d 1225 (11th Cir. 2004); *Burke v. United States*, 152 F.3d 1329, 1331-32 (11th Cir. 1998)); *accord Ware v. United States*, No. 09-60185-CIV, 2009 WL 2567023, * 8 (S.D. Fla. May 14, 2009) (denying § 2255 claim of improper application of guidelines as a non-cognizable claim absent a fundamental defect rising to miscarriage of justice, and collecting other cases denying § 2255 motions predicated upon a misapplication of the guidelines).

In this case, although the Movant raised the career offender enhancement issue on direct appeal, and timely filed his Motion to Vacate, much like the movants in *Gonzalez* and *Harris*, Mr. Beckles has not asserted that a misapplication of the sentencing guidelines resulted in the imposition of a sentence in excess of the statutory maximum penalty for his crime of conviction. Rather, the Movant has only contended that the sentencing Court misapplied the guidelines to his sentence which resulted in a sentence higher than the sentence he would have received had the correct guideline been applied. As stated above, and made

clear by the applicable case law, such a claim is not cognizable on a § 2255 motion seeking collateral relief. This conclusion is not altered by the fact that this same claim may have entitled the movant to relief if it had been raised on direct appeal after the Supreme Court's ruling in *Begay* and the Eleventh Circuit's ruling in *Archer*. Rather, as stated above, § 2255 "does not encompass all claimed errors in conviction and sentencing." *United States v. Addonizio*, 442 U.S. 178, 185 (1979). As such, the movant has not raised a cognizable claim.

3. The Movant's Sentence Does Not Constitute a Fundamental Miscarriage of Justice

Even assuming *arguendo* that guideline sentencing errors may be cognizable under § 2555, the Movant is still not entitled to relief as he has failed to demonstrate that his sentence constitutes a miscarriage of justice. Indeed, as correctly stated by the Movant in his Reply brief and conceded at oral argument, the central issue in this matter is whether the "misapplication" of the career offender guideline presents a fundamental miscarriage of justice (DE # 24-4). Implicit in this query is the fact that, as discussed above, typically sentencing errors based upon a misapplication of the guidelines are not cognizable on § 2255 grounds, unless there is a fundamental miscarriage of justice. Thus, the undersigned examines what constitutes a fundamental miscarriage of justice to determine

whether Mr. Beckles is entitled to relief pursuant to § 2255.

In *Johnson v. Alabama*, 256 F.3d 1156 (11th Cir. 2001), the Eleventh Circuit described a "fundamental miscarriage of justice" as follows,

> If a petitioner cannot show cause, he may still survive a procedural bar by proving that the failure to hear the merits of his claim would endorse a fundamental miscarriage of justice. *See Murray*, 477 U.S. at 495, 106 S.Ct. at 2649. This exception is exceedingly narrow in scope, as it concerns a petitioner's "actual" innocence rather than his "legal" innocence. *See Calderon v. Thompson*, 523 U.S. 538, 559, 118 S.Ct. 1489, 1502-03, 140 L.Ed.2d 728 (1998); *Murray*, 477 U.S. at 495-96, 106 S.Ct. at 2649 (explaining that a "fundamental miscarriage of justice" occurs "in an extraordinary case, where a constitutional violation has resulted in the conviction of someone who is actually innocent").

Id. at 1171. In *Johnson*, although the Court considered whether a fundamental miscarriage of justice had occurred which was sufficient to overcome a procedural bar in the § 2254 context, the Court's language illustrates that the miscarriage of justice standard is exceedingly narrow in scope.

Consistent with this conclusion, in *Ayuso v. United States*, 361 Fed. App'x 988 (11th Cir. 2010), the Court,

in rejecting a movant's § 2255 challenge to his sentence predicated upon a miscalculation of his criminal history points stated,

> A non-constitutional error that results in a miscarriage of justice "should present exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Hill v. United States*, 368 U.S. 424, 428 (1962) (quotation omitted). Errors that seriously undermine the validity of criminal proceedings have been held to constitute a miscarriage of justice. *See, e.g.*, *Davis v. United States*, 417 U.S. 333, 346-47 (1974) (holding that a prisoner's claim that he was convicted for a legal act was cognizable under § 2255); *United States v. Behrens*, 375 U.S. 162, 164-66 (1963) (holding that prisoner was entitled to relief under § 2255 where his sentence was imposed outside of the prisoner's or counsel's presence).

Id. at 991 (parallel citations omitted). The Court continued:

> Here, Ayuso's sentencing claim is not cognizable under § 2255 because it is not a constitutional error and does not rise to the level of a miscarriage of justice. In his pleadings below and in his brief on appeal, Ayuso does not indicate that the alleged miscalculation of his criminal points implicates a constitutional error. In addition, Ayuso's sentencing claim is distinguishable from those errors that have been held to constitute a miscarriage of justice, as these errors implicated a fundamental

> defect in the validity of the district court proceedings.

Id. Similarly, in *Vallas v. United States*, No. 09-00754-CG, 2012 WL 2681398, at * 5 (S.D. Ala. June 7, 2012), a district court concluded that a movant's § 2255 claim that a misapplication of guidelines prior to a change in law as to what constituted a crime of violence for purposes of calculating the movant's criminal history points, did not "so 'seriously undermine[d] the validity of [his] criminal proceedings' that it would, if condoned constitute a miscarriage of justice." *Id.* at *5, citing *Ayuso v. United States*, 361 Fed. App'x 988, 991 (11th Cir. 2010).

Based upon the applicable case law, under the facts of this case, Mr. Beckles is not entitled to relief on the grounds of a miscarriage of justice because his sentence does not meet that exceedingly narrow scope that implicates a fundamental defect in the validity of the district court proceedings. Indeed, it is undisputed that had Mr. Beckles been sentenced without a guideline career offender enhancement, his guideline sentencing range would have been between 262 and 327 months. In addition, it is undisputed that even without the guideline career offender enhancement, Mr. Beckles would be subject to a fifteen year minimum mandatory sentence (180 months) pursuant to 18 U.S.C. § 924(e), the Armed Career Criminal statute. Finally, due to the Rule 35 reduction awarded to Mr. Beckles, he is currently serving a sentence of 216 months. Mr. Beckles therefore is currently serving a sentence which is 46 months below the guideline range that the

Movant contends is the proper guideline range. As such, under the facts of this case, Mr. Beckles has failed to show that his sentence is "illegal" or a "miscarriage of justice" as it does not exceed the statutory maximum and could be reimposed even without the career offender enhancement. The undersigned is therefore unable to conclude that his sentence constitutes a miscarriage of justice, and thus he is not entitled to relief pursuant to § 2255.[14]

4. The Movant is not Actually Innocent of Being a Career Offender

The Movant attempts to demonstrate that his sentence rises to the level of a miscarriage of justice and thus is cognizable on a § 2255 claim, by implying that Mr. Beckles is actually innocent of being a career criminal (DE # 19 at 4). In this regard, Mr. Beckles does not assert that he is actually innocent of being a felon in possession of a firearm. Rather, he contends that because the career offender enhancement requires a finding that the crime of conviction is a "crime of violence,"

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[14] Although the Movant contends, and the Government concedes, that the sentencing court likely would have granted the Movant a 40% reduction on his sentence even if he had been sentenced to the correct guideline at his initial sentencing, this fact does not alter the conclusion that a challenge to the misapplication of the guidelines does not present a cognizable § 2255 claim where the movant is already serving a sentence within the correct guideline range and the sentence does not exceed the statutory maximum.

which the crime of felon in possession is not, that he is not a career offender under the guidelines.

This very argument was rejected by the Eleventh Circuit in *McKay* and *Gilbert*. The Eleventh Circuit has consistently held that actual innocence in sentencing can only be established if the person is factually innocent of the underlying crime, or if the crime for which the person is sentenced is later determined to not constitute criminal conduct.[15]

In *Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011) (en banc), although the Court considered whether the Movant had properly presented an actual innocence claim in the context of whether that claim was sufficient to overcome a procedural default, that case nonetheless provides guidance as to whether Mr. Beckles has presented an "actual innocence" claim in this action. The movant in *Gilbert* argued, *inter alia*, that he was actually innocent of being a career offender, but the Eleventh Circuit categorically rejected that claim, explaining that the defendant was neither charged with, nor convicted of, being a career offender. *Id.* at 1304-05. *Accord Bido v. United States*, 438 Fed. App'x 746 (11th Cir. 2011) (rejecting movant's actual innocence claim of guideline misapplication raised in

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[15] For purposes of this Report and Recommendation, the undersigned assumes, without deciding, that actual innocence of sentence claims may be raised in a non-capital sentencing context. *See Rivers v. United States*, 476 Fed. App'x 848, 849-50 (11th Cir. 2012) (discussing limitation of actual innocence exception to procedural default context where movant challenges imposition of non-capital sentence).

an attempt to excuse procedural default of § 2255 claims).[16]

Similarly, in *McKay v. United States*, 657 F.3d 1190, 1196-97 (11th Cir. 2011), the Eleventh Circuit rejected a petitioner's § 2255 actual innocence claim where the petitioner argued that his conviction for carrying a concealed weapon had been misclassified as a crime of violence for purposes of a § 4B1.1 sentence enhancement. *Id.* at 1194-95. The reviewing Court denied the petitioner's claim, opining that an alleged misclassification of a crime was a legal argument, and the petitioner did not assert that he was factually innocent of carrying a concealed weapon. *Id.* at 1199. Thus, the Court declined to extend the actual innocence of sentence exception to claims of legal innocence of a predicate offense used to justify an enhanced sentence. *Accord Stevens v. United States*, 446 Fed. App'x 789 (11th Cir. 2012) (same).

Finally, in *Orso v. United States*, 452 Fed. App'x 912 (11th Cir. 2012), the reviewing Court, after assuming arguendo that the Movant had raised a cognizable

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[16] It is for this same reason, as discussed *supra.*, that the Movant's citation to cases where sentencing courts misapprehended certain underlying facts related to a defendant's convictions are not applicable here. The sentencing Court in this case did not sentence Mr. Beckles based upon factual inaccuracies, rather, Mr. Beckles challenges his sentence based upon a legal analysis. Again, Mr. Beckles does not contend here that the Court was mistaken about the fact that he was a felon in possession of a short-barreled shotgun.

§ 2255 claim, examined whether the movant had provided sufficient grounds to excuse his procedural default related to his collateral challenge to a career offender enhancement. The Court concluded that the Movant had failed to prove that he was actually innocent of the underlying conduct upon which the career enhancement was based, and that he therefore failed to demonstrate that a "fundamental miscarriage of justice" had occurred in the application of the career offender enhancement to his sentence. The Court reached that opinion notwithstanding the fact that the Eleventh Circuit had, subsequent to the movant's sentencing, held that the underlying conduct, fleeing or attempting to elude the police, was not a "violent felony" for purposes of supporting the imposition of the career offender enhancement. Thus, the Court concluded that the change in the law regarding what constituted a violent felony for purposes of a career criminal enhancement was insufficient, absent a claim of actual innocence, to provide a basis for excusing a procedurally defaulted claim under § 2255.[17]

In a further attempt to demonstrate that the sentencing guideline error raised by Mr. Beckles is cognizable on a § 2255 motion and rises to a miscarriage of justice, the Movant, in his Supplemental Reply relies heavily on *Narvaez v. United States of America*, 674

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[17] The Court in *Orso* again left open the question of whether a successful claim could be made on an initial § 2255 on this basis. However, the undersigned cites to *Orso* for its analysis of "actual innocence" for purposes of establishing whether a miscarriage of justice has occurred.

F.3d 621 (7th Cir. 2011) and *Johnson v. United States*, 544 U.S. 295 (2005). In *Narvaez*, the defendant was convicted of an offense that normally would have resulted in a guideline range of between 100 and 125 months. *Narvaez*, 674 F.3d at 624. However, the district court found that the defendant was a career offender, which resulted in the defendant receiving a career offender enhancement that increased his guideline range to between 151 and 188 months. The Court sentenced the defendant under the then-mandatory guidelines to 170 months of incarceration. The defendant thereafter filed a motion for collateral relief pursuant to 28 U.S.C. § 2255, claiming that the Supreme Court's rulings in *Begay* and *Chambers v. United States*, 522 U.S. 122 (2009) had effected a subsequent change in law which rendered his sentence as a career offender improper because the crimes that served as the basis for this enhancement were no longer crimes of violence.[18] The district court denied the defendant's § 2255 motion finding that the rulings in *Begay* and *Chambers* did not apply retroactively to cases on collateral review.

The Seventh Circuit Court of Appeals, however, reversed the district court and held that the subsequent case law did apply retroactively to the defendant's

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[18] As mentioned above, *Begay v. United States*, 533 U.S. 137 (2008), narrowed the definition of what constituted a violent felony under the Armed Career Criminal Act. In *Chambers v. United States*, 522 U.S. 122 (2009), the Supreme Court analyzed the definition of "violent felony" under the Armed Career Criminal Act and concluded that a conviction for knowingly failing to report to a penal institution was not a violent felony under that statute.

case. *Id.* at 625. The Court then noted that although sentencing errors are "generally not cognizable on collateral review," such errors are cognizable on collateral review when "a postconviction clarification in the law has rendered the sentencing court's decision unlawful." *Id.* at 627. The Court analogized Mr. Narvaez's case to *Davis v. United States*, 417 U.S. 333 (1974), in which the Supreme Court held that a subsequent interpretation of a statute which resulted in the defendant being convicted and punished "for an act that the law does not make criminal" was cognizable under 28 U.S.C. § 2255, and would constitute "a complete miscarriage of justice" if the defendant were not granted relief. *Id.* In so doing, the reviewing Court in *Narvaez* acknowledged that *Davis* provided for relief "when a defendant is innocent of the underlying crime," but the Court nevertheless concluded that the rationale applied in *Davis* was sufficiently analogous to Narvaez's claim that he did not qualify as a career criminal at the time of his sentence to entitle Mr. Narvaez to § 2255 relief. *Id.*

Further, the Court stated that the career offender enhancement, among other things, "created a legal presumption that [the Defendant] was to be treated differently from other offenders because he belonged in a special category reserved for the violent and incorrigible," and that "[s]peculation that the district court might today impose the same sentence is not enough to overcome the fact that, at the time of his initial sentencing, [the Defendant] was sentenced based upon the

equivalent of a nonexistent offense." *Id.* The Court concluded by stating that while the Defendant "does not have an absolute right to a lower sentence," he "does have an absolute right not to stand before the court as a career offender when the law does not impose that label on him." *Id.*

However, *Narvaez* is distinguishable from the instant case for the following reasons. First, subsequent to the district court's determination in *Narvaez*, the United States Sentencing Guidelines have become advisory rather than mandatory. While this fact, standing alone, may not have altered the reviewing court's conclusion that the movant's sentence constituted a miscarriage of justice, it is significant that the Court in *Narvaez* referred to the then-mandatory nature of the Guidelines throughout the opinion. Indeed, the Court in *Narvaez* specifically stated, "Moreover, at the time of Mr. Narvaez's sentencing, the Guidelines were *mandatory*. The imposition of a career offender status therefore increased the sentencing range the district court was authorized to employ." See *United States v. Booker*, 543 U.S. 220, 234 (2005) ("Because [the Guidelines] are binding on judges, we have consistently held that the Guidelines have the force and effect of laws.")" *Id.* at 628-29.

In this case, unlike in *Narvaez*, the Court had the authority to depart from the advisory guidelines, either upward or downward. In this regard, it is worth noting that, at the sentencing hearing, the Court stated,

> When I look at the exhibits which have been introduced today, the certified copies of the prior convictions, what stands out is that the defendant was never appropriately punished for any of his prior felony convictions. You weren't simply given one pass, Mr. Beckles. You were given too many passes and, perhaps, that sent the wrong message to you.
>
> I am not persuaded, to depart from the advisory Guideline range here and sentence you outside of the Guidelines.
>
> I have given careful consideration to the statutory factors contained in 18 U.S.C. §3553. I am mindful of the need to have this sentence reflect upon the seriousness of the offense, provide deterrence and safeguard the community from you, Mr. Beckles, because you have shown that you cannot live within the law.

(Cr. DE # 75: October 17, 2007 Sentencing Tr. at 41-43). Thus, the Court recognized that it had the authority to impose a sentence that it felt was appropriate notwithstanding the guideline range.[19]

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[19] In *Narvaez*, the movant sought to have his sentence vacated where the trial court relied upon two prior state convictions to apply the career offender enhancement to his sentence, where it had been later determined that the prior state convictions did not constitute crimes of violence as contemplated by the career offender statute. The case at bar is distinguishable from those cases where an enhancement predicated upon a state conviction is found to be cognizable on a § 2255 motion to vacate because the state conviction has been vacated. In such cases, the Eleventh

In addition, in order to extend the Court's reasoning in *Narvaez* to the instant matter, this Court would have to equate the magnitude of a misapplication of an advisory guideline to that of a conviction and sentencing of a defendant for conduct which does not constitute a crime.[20] As discussed above, the Eleventh Circuit has held that a conviction and sentencing for behavior that is no longer criminal is not analogous to the situation where a movant challenges his innocence to a guideline enhancement. *See McKay v. United States*, 657 F.3d 1190, 1199 (11th Cir. 2011). Thus, the undersigned concludes that the *Narvaez* case, which is not

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Circuit has made clear that a movant may challenge that enhancement. *United States v. Walker*, 198 F. 3d 811 (11th Cir. 2000); *Stewart v. United States*, 646 F. 3d 856 (11th Cir. 2011). *See, e.g., Bazemore v. United States*, No. CV411-259, 2012 WL 3552702, at *1 (S.D. Ga. Aug. 15, 2012) (finding that § 2255 movant was entitled to relief where prior state sentences, upon which federal enhancements were predicated, were vacated.) The Eleventh Circuit has made no such determination in cases where the defendant only seeks to challenge the application of a guideline enhancement to his sentence without more. Such a distinction is of particular significance under the facts of this case, where the Movant is currently serving a sentence which falls within the purported "correct" guideline range.

[20] It bears noting that the undersigned disagrees with the Government's contention that the fact that Mr. Beckles is serving "only 33 months above the correct guideline range" demonstrates that this matter does not constitute a miscarriage of justice (DE # 8 at 12). Rather, the undersigned agrees with Mr. Beckles' contention that, as suggested in *Glover v. United States*, 531 U.S. 198 (2001), any additional amount of actual jail time may be significant for purposes of establishing prejudice. However, because *Glover* involved a constitutional Sixth Amendment claim of ineffective assistance of counsel, *Glover* does not control resolution of this case.

binding on this Court, is distinguishable from the instant case; and, more significantly concludes that based upon the relevant Eleventh Circuit case law, *Narvaez* likely would be decided differently in this Circuit.

Instead, the undersigned concludes that, as opposed to *Narvaez*, the law in the Eleventh Circuit is consistent with the en banc decision of the Eighth Circuit Court of Appeals in *Sun Bear v. United States*, 644 F.3d 700 (8th Cir. 2011) (en banc). In *Sun Bear*, the defendant pled guilty to a crime that ordinarily would have resulted in a guideline range of between 292 and 365 months. However, the Court found that the defendant was a career offender, which resulted in the defendant receiving an enhancement that increased his guideline range to between 360 months and life. *Id.* at 702. The defendant was sentenced under the then-mandatory guidelines to 360 months of incarceration. *Id.* After several cases limited the definition of a "crime of violence" for purposes of the career offender enhancement, the defendant collaterally attacked his sentence pursuant to 28 U.S.C. § 2255, alleging that his status as a career offender was imposed in violation of the law. *Id.* The defendant's Motion was denied by the district court, but a panel of the Eighth Circuit reversed this decision, holding that the new cases applied retroactively to Movant Sun Bear, and concluding that the Movant could raise his claim under 28 U.S.C. § 2255 because his case "[was] based on a postconviction change in the law that renders unlawful the district court's sentencing determination." *Sun Bear v.*

United States, 611 F.3d 925, 930 (8th Cir. 2010). The panel of the Eighth Circuit opined "[t]here can be no room for doubt that such a circumstance inherently results in a miscarriage of justice and presents exceptional circumstances that justify collateral relief under § 2255." *Id.*

Upon rehearing en banc, however, the Eighth Circuit reversed the decision of the panel, stating that the defendant's "collateral attack on an application of the career offender guidelines is not cognizable under 28 U.S.C. § 2255." *Id.* at 704. In reaching this conclusion, the Court reiterated that § 2255 challenges to the misapplication of the guidelines are only cognizable when they constitute a miscarriage of justice. The en banc Court opined that a sentence is not unlawful unless it is in excess of the statutory maximum and observed that the defendant's sentence in that case was within the statutory maximum. In addition, the en banc Court concluded that because the defendant was sentenced within the guideline range the defendant would have received had he not received a career offender enhancement, there was no miscarriage of justice. *Sun Bear*, 644 F.3d at 705.[21]

The *en banc* Court also distinguished *Davis v. United States*, 417 U.S. 333, 346 (1974), stating that the subsequent Supreme Court case of *United States v.*

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[21] The initial guideline range in *Sun Bear* was between 292 and 365 months, as opposed to the career offender guideline range of between 360 months and life. The defendant had received a sentence of 360 months.

Addonizio, 442 U.S. 178, 186-87 (1979), interpreted *Davis* as stating that it would be a miscarriage of justice if a subsequent change in the law made the conduct for which a defendant was convicted and sentenced lawful, but the defendant in *Sun Bear* was convicted and sentenced for conduct that was still unlawful. *Id.* Thus the Eighth Circuit's rationale in distinguishing *Sun Bear* from *Davis* is akin to the distinction of actual innocence discussed above made by the Eleventh Circuit in *Gilbert* and *McKay*, as discussed above, and is applicable to this case. The Movant in this case, unlike the defendant in *Davis*, does not contend that he is actually innocent of being a felon in possession of a shotgun, and his actions for which he was convicted and sentenced remain illegal to this day. Accordingly, both *Sun Bear* and the case at bar are distinguishable from the situation in *Davis* that the Supreme Court concluded rose to the level of a miscarriage of justice.

Further, the Movant's reliance on *Johnson v. United States*, 544 U.S. 298 (2005) is misplaced. In *Johnson*, the Supreme Court evaluated whether the one-year statute of limitation applied to § 2255 actions was re-triggered once a state court had vacated one of the state convictions, that had been used to enhance the movant's federal sentence. In so doing, the Court in *Johnson* summarized the Supreme Court holdings in *Custis v. United States*, 511 U.S. 485 (1994) and *Daniels v. United States*, 532 U.S. 374 (2001) which made clear that certain enhanced federal sentences may be challenged when a prior state conviction supporting those enhancements has been vacated. Those cases,

however, go no further than that and the undersigned is unaware of any Eleventh Circuit case that has extended those cases to a situation analogous to the sentencing guideline error presented in this case.[22] This case does not involve a vacated conviction, either state or federal. Rather, the Movant only presents an argument that the sentencing court was incorrect in the way that it interpreted and applied the career offender enhancement under the guidelines.

Finally, the undersigned notes that although the Movant downplays the importance of finality as part of the calculus in determining cognizability, finality is an important concern. In the posture of this case, the Government did not challenge the existence of an error, and the reasonable probability of a lower sentence in the absence of this error; however, the issue of cognizability applies across the board to all sentencing guidelines determinations. *See Parks v. United States*, 832 F. 2d 1244, 1246 (11th Cir. 1987) (noting that societal interests in the finality of judgment and efficiency of judicial process required that the scope of collateral attacks be more limited than direct appeals). To permit a challenge under § 2255 where the sentence imposed falls within both the statutory maximum and the correct sentencing guidelines range, would impermissibly

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[22] The other cases cited to by the Movant regarding the availability of collateral relief in cases where a state court conviction upon which an enhancement was predicated was vacated similarly provide no additional guidance with respect to the factual scenario presented in this case.

denigrate the finality of numerous sentencing decisions made in every case. To underscore this point, there is no claim in this case that the sentence imposed exceeded the correct guideline range.

Simply put, although this case presents a close call, the undersigned concludes that Mr. Beckles' current sentence, which is well within the statutory maximum and within the guideline range that Mr. Beckles would have received had the career offender guideline not been applied to his sentence, does not constitute a miscarriage of justice. As such, Mr. Beckles has failed to demonstrate that his sentence constitutes a fundamental miscarriage of justice that warrants relief pursuant to § 2255.

VII. CERTIFICATE OF APPEALABILITY

Section 2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." 28 U.S.C. § 2255, Rule 11(a). A timely notice of appeal must be filed even if the court issues a certificate of appealability. 28 U.S.C. § 2255, Rule 11(b).

Since this case is a close call, and the Eleventh Circuit has not expressly decided whether a Sentencing Guidelines error that results in an increased sentence

is cognizable pursuant to § 2255, and there is a reasonable probability that the Movant would have received a lower sentence in the absence of the career offender enhancement, the undersigned concludes that it is appropriate for the District Court to issue a Certificate of Appealability if this Report and Recommendation is adopted. This conclusion is supported by the dissenting opinions in the analogous cases of *Rozier v. United States*, No. 11-13557, ___ F.3d ___, 2012 WL 5870123 (11th Cir. Nov. 21, 2012), and *Gilbert*, which were decided on other grounds, as well as the decision of the Seventh Circuit Court of Appeals in *Narvaez*, and the fact that the Eleventh Circuit expressly noted in *Gilbert* that it did not decide whether the claim presented in this case would be cognizable on a first time § 2255 motion. Moreover, the Eleventh Circuit has previously issued a Certificate of Appealability on the issue of whether a career offender enhancement challenge is cognizable in proceedings under § 2255. *McKay v. United States*, 657 F.3d 1190 (11th Cir. 2011).

If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the District Judge in objections to this report.

VIII. CONCLUSION

Based upon the foregoing, the undersigned respectfully

RECOMMENDS that the Motion to Vacate sentence pursuant to 28 U.S.C. § 2255 be **DENIED**, and

that a Certificate of Appealability be issued, as set forth above.

The parties will have 14 days from the date of this Report and Recommendation within which to file written objections, if any, for consideration by the Honorable Cecilia M. Altonaga, United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal any factual findings contained herein. *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988); *Resolution Trust Corp. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

DONE AND SUBMITTED in chambers at Miami, Florida on December 17, 2012.

/s/ Andrea M. Simonton
ANDREA M. SIMONTON
UNITED STATES
MAGISTRATE JUDGE

Copies provided to:

The Honorable Cecilia M. Altonaga,
United States District Judge

All counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-23517-CIV-ALTONAGA/Simonton

TRAVIS BECKLES,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent. /

ORDER

(Entered Mar. 4, 2013)

THIS CAUSE came before the Court on Magistrate Judge Andrea M. Simonton's Report and Recommendation on Motion to Vacate Pursuant to 28 U.S.C. § 2255 ("Report") [ECF No. 27], issued on December 17, 2012. On September 30, 2010, Movant, Travis Beckles ("Beckles" or "Movant"), by and through counsel, filed a Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 ("Motion" or "Section 2255 Motion") [ECF No. 1]. The Court referred the Motion to Magistrate Judge Stephen T. Brown on October 4, 2010. (*See* [ECF No. 5]). On January 28, 2011, the Court set aside the referral and administratively closed the case in light of the then-pending *en banc* hearing in *Gilbert v. United States*. (*See* Order dated Jan. 28, 2011 [ECF No. 10]). After the Eleventh Circuit issued its *en banc* decision, *see Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011), the case was reopened, and the Motion was

referred to Magistrate Judge Simonton. (*See* Order dated June 22, 2011 [ECF No. 16]). Magistrate Judge Simonton received supplemental briefs on the Motion (*see* [ECF Nos. 19, 20]), and heard oral argument (*see* [ECF No. 26]).

The sole issue before Magistrate Judge Simonton was whether Beckles's challenge to the determination of his sentencing guideline range is cognizable in a Section 2255 motion. (*See* Rep. 2). More specifically, the question was

> whether a defendant may obtain relief pursuant to 28 U.S.C. § 2255 where his advisory sentencing guideline range was incorrectly enhanced using the career offender guideline, he preserved the error for review on direct appeal, has timely filed his first Motion to Vacate pursuant to 28 U.S.C. § 2255, and there is a reasonable probability that he received a greater sentence than he would have received if his guideline range had been properly calculated; but the sentence imposed after giving him credit for providing substantial assistance to the government was below the unenhanced guideline range applicable to non-career offenders.

(*Id.* 3). After careful consideration, Judge Simonton recommends the Motion be denied, but that a certificate of appealability be issued. (*See id.* 36). Beckles timely filed Objections [ECF No. 28], to which the United States ("Government"), responded (*see* Resp. [ECF No. 33]). The Court has conducted a *de novo* review of the record and has carefully considered the

Report, the parties' respective positions, and applicable law.

I. BACKGROUND

A jury convicted Beckles on August 2, 2007 of possession of a firearm by a convicted felon, in violation of 18 U.S.C. section 922(g). Following the trial, the Pre-Sentence Investigation Report ("PSI") prepared for the Court recommended that Beckles be sentenced as an armed career criminal pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e), which requires that a minimum sentence of 15 years (180 months) be imposed. The offense statutory maximum is a life sentence.

Pursuant to the Armed Career Criminal Act, the United States Sentencing Guidelines ("U.S.S.G." or "Sentencing Guidelines") provide:

> The offense level for an armed career criminal is the greatest of:
>
> (2) the offense level from §4B1.1 (Career Offender) if applicable; or
>
> (3) (A) **34**, . . if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a)[1].

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[1] There is no current dispute that Beckles possessed a firearm of a type described in 26 U.S.C. section 5845(a), namely, a sawed-off shotgun.

U.S.S.G. § 4B1.4(b) (2006) (emphasis in original). Under the Career Offender provision, an offense with a statutory maximum sentence of life is assigned an offense level of 37. (*See id.* § 4B1.1). A criminal history category of VI, which was assigned to Beckles, corresponds to the following sentencing guideline ranges: 262 to 327 months for an offense level of 34; 360 months to life for an offense level of 37 Ultimately, the PSI recommended that Beckles be sentenced as a career offender[2] as "he was at least 18 years old at the time of the instant offense, the instant offense is a felony crime of violence (unlawful possession of a sawed-off shotgun), and the defendant has at least two prior felony convictions of a controlled substance offense." (PSI 6).[3]

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[2] A defendant is a career offender if

(1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction;

(2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and

(3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1 (indentation added). It is evident that Beckles's crime is not a controlled substance offense. It is also undisputed that Beckles does not challenge either the first or third requirement.

[3] An electronic version of the PSI is unavailable on the Court's CM/ECF Case Management System.

At the October 17, 2007 sentencing hearing, the Court observed:

> [T]he Defendant has 18 arrests that resulted in convictions and/or juvenile adjudications, and I note in the presentence report 12 additional arrests that did not result in convictions, and we have a defendant, Mr. Beckles, who is 24-years-old. That's a pretty extensive criminal history. .
>
> When I look at the exhibits which have been introduced today, the certified copies of the prior convictions, what stands out is that the defendant was never appropriately punished for any of his prior felony convictions. .
>
> I share in [A.U.S.A.] Mr. Koukios' sentiments that the failure of the State Criminal Justice System to adequately and appropriately have addressed the severity of your crimes is not a reflection upon what occurs here. It is a sad testament that you are going to be sentenced today to a term of imprisonment far in excess of anything you have ever remotely experienced, and [your attorney,] Mr. Spivak has time and time again in this case presented arguments on your behalf as to why I should not sentence you within the Guidelines, and Mr. Koukios has responded by referring the Court back to Congress' mandate as it pertains to career offenders such as yourself, and Congress has spoken and directed the Sentencing Commission that the Guideline for career offenders should specify

> a sentence to a term of imprisonment at or near the maximum term authorized – the maximum – and the maximum here, of course, is life.
>
> The Sentencing Commission also established certain minimum offense levels where the weapon possessed is a sawed-off shotgun, as it was here.
>
> I am not persuaded, notwithstanding that I agree with Mr. Spivak that you were not appropriately sentenced in the State Court, to depart from the advisory Guideline range here and to sentence you outside the Guidelines.

(Sentencing Tr. dated Oct. 17, 2007, at 40:23-41:3, 41:4-8, 42:7-43:3 [ECF No. 75 in Case No. 07-20305-CR]).

Following Beckles's unsuccessful direct appeal of his original sentence,[4] on April 7, 2010, the Government filed a Motion for Reduction of Sentence Pursuant to Federal Rule of Criminal Procedure 35(b) [ECF No. 33]. On June 22, 2010, the Court held a hearing and granted the Motion. (*See* Tr. for Hr'g dated June 22, 2010, at 8:7-8 [ECF No. 18 in Case No. 07-20305-CR]). The hearing focused on the extent of Beckles's cooperation with the Government, with no specific discussion of the crime for which Beckles was imprisoned. (*See generally id. passim*). Although the Government requested only a 20 percent sentencing

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[4] *See United States v. Beckles*, 565 F.3d 832 (11th Cir. 2009) (affirming conviction and sentence); *Beckles v. United States*, 130 S. Ct. 272 (2009) (denying petition for writ of certiorari).

reduction, the Court was persuaded that a 40 percent reduction was warranted. (*See id.* 8:8-9). Beckles's prison term was thereby reduced to 216 months. (*See* Order dated June 22, 2010 [ECF No. 150 in Case No. 07-20305-CR]).

Beckles now challenges his sentence, asserting that his original sentence was improperly enhanced because unlawful possession of a sawed-off shotgun is not a crime of violence, and therefore, he is not a career offender. Beckles contends had he not been deemed a career offender, the appropriate sentencing guidelines would have yielded a sentencing range of 262 to 327 months; consistent with what the Court did at his sentencing hearing the Court would have sentenced Beckles to the low-end of the guidelines range;[5] and application of the Court's subsequent 40 percent reduction would have yielded a final sentence of 180 months, the statutory minimum sentence required for unlawful possession of a firearm by a felon. The Government opposes the relief sought in the Motion solely on the ground that Beckles's challenge is not cognizable under Section 2255. (*See* Rep. 2 & n.1 (declining to *sua sponte* address argument not properly raised in the parties' briefs); *see generally* Resp. (no objection to Judge Simonton's decision to decline to address issues not discussed in the papers)).

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[5] A forty percent reduction from even the high-end of the correct guidelines would have also yielded a lesser sentence of 196 months.

II. LEGAL STANDARD

When a magistrate judge's "disposition" has properly been objected to, district courts must review the disposition *de novo*. FED. R. CIV. P 72(b)(3). When no party has timely objected, however, "the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." FED. R. CIV. P. 72 advisory committee's notes (citation omitted). Although Rule 72 itself is silent on the standard of review, the Supreme Court has acknowledged Congress's intent was to only require a *de novo* review where objections have been properly filed, not when neither party objects. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985) ("It does not appear that Congress intended to require district court review of a magistrate [judge]'s factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings."). In any event, the "[f]ailure to object to the magistrate [judge]'s factual findings after notice precludes a later attack on these findings." *Lewis v. Smith*, 855 F.2d 736, 738 (11th Cir. 1988) (citing *Nettles v. Wainwright*, 677 F.2d 404, 410 (5th Cir. 1982)).

III. DISCUSSION

Section 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground
>
> [(1)] that the sentence was imposed in violation of the Constitution or laws of the United States, or
>
> [(2)] that the court was without jurisdiction to impose such sentence, or
>
> [(3)] that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack,
>
> may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a) (emphasis added). Beckles's sentence clearly does not exceed the maximum authorized by law, which is life imprisonment. The Court's jurisdiction is also not at issue. Thus, what remains for the Court to determine is whether Beckles's cause falls under any of the remaining statutory grounds for relief; namely, whether the sentence: (1) was imposed in violation of the Constitution; (2) was imposed in violation of the laws of the United States; or (3) is otherwise subject to collateral attack. The Court reviews each possible ground for relief in turn.

A. Whether the Sentence Violates the Constitution

Although Beckles initially asserted that the sentence was imposed in violation of his constitutional due process rights (*see* Rep. 14 (citing Reply 2 [ECF No. 9]), he did not specifically object to Judge Simonton's conclusion that such an argument was rejected by the Eleventh Circuit in *Gilbert*, 640 F.3d 1321-22 ("Gilbert's claim that a sentencing guidelines provision was misapplied to him is not a constitutional claim. If it were, every guidelines error would be a constitutional violation. However prescient the Founders may have been in other respects, they did not think to incorporate the sentencing guidelines into the Constitution or Bill of Rights. Nor is it plausible to suggest . . that every error adversely affecting a defendant's sentence violates the Due Process Clause."). Accordingly, *de novo* review of this issue is not warranted.

The undersigned has reviewed the Report, the Motion, the record, and the applicable law to assure herself that no clear error appears on the face of the record. In the light of that review, the undersigned agrees with the analysis and recommendations stated in Judge Simonton's Report that relief is unavailable under this prong of Section 2255.

B. Whether the Sentence Violates the Laws of the United States

It is well established that a claim raised under Section 2255 need not be of constitutional dimension

to be cognizable. *See Davis v. United States*, 417 U.S. 333, 342-46 (1974); *id.* at 344 ("[T]here can be no doubt that the grounds for relief under § 2255 are equivalent to those encompassed by § 2254, the general federal habeas statute, under which relief is available on the ground that '(a person) is in custody in violation of the Constitution or laws or treaties of the United States.'" (alterations in original)). Nevertheless, not "every asserted error of law can be raised on a § 2255 motion." *Id.* at 346. Indeed, "'collateral relief is not available when all that is shown is a failure to comply with the formal requirements' of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error." *Id.* (quoting *Hill v. United States*, 368 U.S. 424, 429 (1962)). Rather, for a movant to obtain relief, the claimed error of law should be "'a fundamental defect which inherently results in a complete miscarriage of justice,' and . . . present[] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Id.* (quoting *Hill*, 368 U.S. at 428); *see also United States v. Addonizio*, 442 U.S. 178, 185 (1979).

What is encompassed by the term "laws of the United States" is disputed by the parties. As Justice Rehnquist once observed, "the term's longevity [since the Habeas Corpus Act of 1867] has not brought with it a corresponding judicial elucidation. Like many other issues in the field of habeas corpus, the question seems to have been left for decision on a case-by-case basis." *Davis*, 417 U.S. at 359 (Rehnquist, J., dissenting). In this case, the Report's careful review of

Eleventh Circuit case law shows that the appellate court has not reached the cognizability issue presented here. *See, e.g.*, *Gilbert*, 640 F.3d at 1306 (finding "no reason to decide" whether a guidelines misapplication claim may be brought in a collateral attack); *McKay v. United States*, 657 F.3d 1190, 1195 (11th Cir. 2011) ("Because we hold that McKay's sentencing claim is procedurally defaulted , we leave for another day the question of whether this type of claim is cognizable under § 2255 in the first instance."). Judge Simonton ultimately concludes that "sentencing guidelines are not 'laws' within the meaning of § 2255" (Rep. 15), and that therefore Beckles's sentence was not imposed in "violation of the laws of the United States." Although the Court recognizes that "errors in the implementation of the Sentencing Guidelines are generally not cognizable in a collateral attack," *Buggs v. United States*, 153 F.3d 439, 443 (7th Cir. 1998) (citations omitted), for the following reasons, the Court departs from Judge Simonton's recommendation.

a. Identifying the Alleged Error

As a threshold matter, the law that Beckles's sentence is alleged to violate must be specifically identified. *See, e.g.*, *Davis*, 417 U.S. at 359-361 (teasing out the "law of the United States" at issue) (Rehnquist, J., dissenting). Beckles does not argue that the violated "law" is contained in the text of or commentary to a particular sentencing guideline. In other words, he does not contend that his offense level was incorrectly calculated because the text of the guidelines manual

was not followed accurately according to the law as it was understood at the time. Indeed, the applicable guidelines manual specifically states: "Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun . .) is a 'crime of violence,' U.S.S.G. § 4B1.2, at 373 (defining terms used in U.S.S.G. § 4B1.1 and including "application notes" in commentary), and the PSI reflects the application of this note. (*See* PSI 6). Rather, throughout Beckles's legal memoranda, he reiterates the violated "law" is that established by *Begay v. United States*, 553 U.S. 137 (2008), *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008), and *United States v. McGill*, 618 F.3d 1273 (11th Cir. 2010) – which counsel that possession of a sawed-off shotgun is not a "crime of violence" within the meaning of U.S.S.G. section 4B1.1.[6]

The alleged error identified here is similar to the law that was violated in *Davis*, 417 U.S. 333. In that case, the petitioner, Joseph Anthony Davis ("Davis"), after having been ordered to report for a pre-induction physical examination by his draft board, failed to appear for the physical. After multiple attempts to

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[6] The Report summarizes the law of those cases as follows: "*Begay* narrowed the definition of what constituted a violent felony under the Armed Career Criminal Act ["ACCA"];" *Archer* held that the "definition of 'violent felony' for purposes of the Armed Career Criminal Act is 'virtually identical' to the definition of a crime of violence for purposes of the career offender guideline enhancement, and that the crime of carrying a concealed firearm is not a crime of violence" (Rep. 5-6); and the Eleventh Circuit concluded in *McGill* that possessing a "short-barreled shotgun was not a violent felony under the ACCA." *McGill*, 618 F.3d 1273, 1279 (11th Cir. 2010).

communicate with Davis to schedule another date for the physical, the draft board declared him a "delinquent" pursuant to 32 C.F.R. section 1642.4(a) (1967). Davis was then ordered to report for induction into the Armed Forces despite not having completed a physical, as the draft board was permitted to do under 32 C.F.R. section 1631.7. Having failed to report for the induction hearing, Davis was prosecuted and convicted under 50 U.S.C. App. § 462(a). Following an unsuccessful appeal of his conviction on the merits, Davis filed a Section 2255 motion, asserting that an intervening change in the law rendered his confinement in violation of the laws of the United States. *See Davis*, 417 U.S. at 335-37, 340, 342-43. The Supreme Court agreed and held that relief under Section 2255 was available to Davis by reason of an intervening change in the law.

Specifically, the law at issue in *Davis* was the Ninth Circuit Court of Appeals panel decision in *United States v. Fox*, 454 F.2d 593 (9th Cir. 1971), which was published after Davis's initial sentencing. *See Davis*, 417 U.S. at 340-41; *id.* at 360 (Rehnquist, J., dissenting) (closely analyzing the majority's opinion). The *Fox* court had addressed nearly identical circumstances as those presented in *Davis*, and relied upon the principles outlined by the Supreme Court in *Gutknecht v. United States*, 396 U.S. 295 (1970), to conclude that an accelerated induction hearing brought about by a declaration of delinquency was, as a matter of law, punitive, and therefore unlawful. The *Davis* Court remanded the case because according to *Fox*, the

act for which Davis was convicted and punished – failure to report for an accelerated induction – was no longer criminal because the induction hearing he failed to attend was unlawful.

Similarly, here, the judicial lawmaking of concern consists of Eleventh Circuit panel decisions, *Archer* and *McGill*, both of which issued after Beckles was first sentenced. These cases were premised on the Supreme Court decision in *Begay* – which was also issued after Beckles's initial sentencing – clarifying the definition of "violent felony" as the term is used in the Armed Career Criminal Act. Directly following from these Eleventh Circuit decisions is the legal conclusion that possession of a sawed-off shotgun is not a "crime of violence" within the meaning of U.S.S.G. section 4B1.1. The Government does not contest this issue in its briefs. Just as the violated "law" at issue in *Davis* was *Fox* and *Gutknecht* (and not the federal regulation under which Davis's accelerated induction hearing was held), the violated "law" here is that expressed in *Begay*, *Archer*, and *McGill* (and not the Sentencing Guidelines that define "crime of violence").

Thus, the Court's inquiry does not hinge on whether the advisory Sentencing Guidelines are or are not "laws of the United States," and whether the misapplication of those Guidelines presents a cognizable Section 2255 claim. Instead, the issue is whether the violation of the principles of *Begay*, *Archer*, and *McGill*, laws unto themselves, presents a cognizable Section 2255 claim.

b. Whether the Error Was a Fundamental Defect Which Inherently Results in a Complete Miscarriage of Justice[7]

To determine whether a violation of the law of *Begay/Archer/McGill* is cognizable on a Section 2255 motion, the error must be "a fundamental defect which *inherently* results in a complete miscarriage of justice." *Davis*, 417 U.S. at 346 (quoting *Hill*, 368 U.S. at 428) (emphasis added). Such an error is one that "renders the entire proceeding irregular or invalid." *Addonizio*, 442 U.S. at 187. Typically, errors of this "fundamental" nature do not include "procedural" errors. *See, e.g.*, *Narvaez v. United States*, 674 F.3d 621, 627-28 n.11 (7th Cir. 2011) (examining five cases where the Supreme Court "addressed the issue of whether a

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[7] The briefing and Report consistently refer to a "*fundamental* miscarriage of justice" standard. However, the analysis required in this case rests on a determination of whether a "*complete* miscarriage of justice" followed from a fundamental defect. *Davis*, 417 U.S. at 346 (quoting *Hill*, 368 U.S. at 428). The Court has no comment on whether the two standards are equivalent.

In any event, case law addressing whether a "fundamental miscarriage of justice" (a term often used interchangeably with "actual innocence" in such cases) exists to overcome a petitioner's procedural default of his claims, is unenlightening. No law has been presented to the Court to support the proposition that *Hill*'s "complete miscarriage of justice" standard is only met when a petitioner's actions for which he was convicted are later deemed lawful. Indeed, in *Addonizio*, 442 U.S. at 187, the grounds raised by petitioner to vacate his sentence rested on a subsequent change to parole policies, wholly unrelated to his underlying guilt. Yet, the Supreme Court did not reject the petitioner's claims for failing to show that he was not innocent; rather, the Court went through a lengthy, careful analysis of why his claim did not warrant Section 2255 relief. *See id.* 187-190.

non-constitutional, non-jurisdictional error is a miscarriage of justice" and observing that the Court found no miscarriage of justice in four cases that involved "errors of a procedural nature," but did find a miscarriage of justice in the sole case involving a "substantive error" (citations omitted)). After carefully reviewing applicable case law, Judge Simonton recommends that because Beckles's current sentence of 216 months "does not exceed the statutory maximum [of a life sentence]" and "could be reimposed even without the career offender enhancement," Beckles's sentence does not "constitute[] a miscarriage of justice." (Rep. 24). For the following reasons, the Court disagrees with this conclusion.

As a threshold matter, the Court clarifies that the violation of the law of *Begay/Archer/McGill* occurred at the initial sentencing hearing when the Court premised its initial sentence on Beckles's career offender status due to his possession of a sawed-off shotgun. (*See* Sentencing Tr. dated Oct. 17, 2007, at 42:17-24 ("Congress has spoken and directed the Sentencing Commission that the Guideline for career offenders should specify a sentence to a term of imprisonment at or near the maximum term authorized. The Sentencing Commission also established certain minimum offense levels where the weapon possessed is a sawed-off shotgun, as it was here.")). This error *inherently* resulted in the application of an incorrect Guidelines range of 360 months to life (*see* Sentencing Tr. dated Oct. 17, 2007, at 40: 13-19), as opposed to a sentencing range of 262 to 327 months. Other unrelated

circumstances that may have fortuitously ameliorated some of the consequences flowing from the error – such as Beckles's substantial cooperation with the Government on an unrelated matter, and the Government's motion for a sentence reduction on that basis – do not affect the Court's present evaluation of the error and its inherent consequences. Indeed, the Government concedes, and the Court agrees, that regardless of Beckles's initial sentence, his cooperation with the Government in an unrelated murder case would have yielded the same 40% reduction in sentence. In short, the critical question is not whether Beckles's modified 216-month sentence is a complete miscarriage of justice, but whether his initial 360-month sentence is a complete miscarriage of justice.

Beckles was clearly prejudiced by the error as it resulted in a sentence disparity of 33 to 98 months. Nevertheless, the Government argues, however, that because the Sentencing Guidelines are now advisory as opposed to mandatory, the disparity is not "illegal" or "invalid"; rather, because the Court maintains discretion to sentence individuals within statutory limits, Beckles's initial sentence, even if issued under misguidance, remains lawful and is therefore not a "complete miscarriage of justice." The Report finds merit in this argument. (*See* Rep. 20-21 (citing *Gonzalez v. United States*, Nos. 8:11-cr-134-T-17EAJ, 8:11-cv-1474-T-17EAJ, 2012 WL 279451 (M.D. Fla. Jan. 31, 2012); *Harris v. United States*, No. 8:11-CV-T-30TBM, 2011 WL 5834749 (M.D. Fla. Nov. 21, 2011)). For the following reasons, the Court disagrees.

Although the Court enjoys broad discretion in sentencing determinations, that discretion is not unfettered. *See Mistretta v. United States*, 488 U.S. 361, 363-370 (1989) (laying out the history of discretionary sentencing in the federal criminal justice system through the 1984 Sentencing Reform Act ("SRA"), 18 U.S.C. § 3551 *et seq.*, which implemented mandatory sentencing guidelines); *United States v. Booker*, 543 U.S. 220, 259 (2005) (severing two provisions of the SRA, including "the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range [ ]in the absence of circumstances that justify a departure[ ]"). The Court must still comply with the SRA, which

> requires judges to *consider the Guidelines sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant*, § 3553(a)(4)(A), the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims, §§ 3553(a)(1), (3), (5)-(7) (2000 ed. and Supp. IV). And the Act nonetheless requires judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care. § 3553(a)(2) (2000 ed. and Supp. IV). .

Id. at 259-260 (emphasis added; internal quotation marks omitted). Sentences can be appealed and reviewed by appellate courts on "reasonableness" grounds. *Id.* at 261. Thus, although "the Guidelines are no longer mandatory, neither are they without force." *United States v. Wetherald*, 636 F.3d 1315, 1321 (11th Cir. 2011). Not only is consideration of the Guidelines required by statute, "[t]he simple reality of sentencing is that a 'sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines.'" *Id.* (quoting *Rita v. United States*, 551 U.S. 338, 351 (2007)). "This starting point serves to cabin the potential sentence that may be imposed." *Id.*

Because the Guidelines are "central to the sentencing process," *id.* at 1322, and have a binding effect, the Eleventh Circuit has held, for example, that the *Ex Post Facto* Clause is violated when a district judge applies the Sentencing Guidelines range in effect on the date of sentencing that is greater than the Guidelines range in effect on the date of the offense, if the decision results in a substantial risk of harsher punishment. *Id.* at 1322-23. *Wetherald* illustrates that although "ordinary" errors in the application of the Guidelines may not result in a complete miscarriage of justice, *Gonzalez*, 2012 WL 279451, at *5, certain application errors do.

That the error illustrated in *Wetherald* is one of constitutional dimension does not preclude a finding that certain non-constitutional Guideline application errors can result in a miscarriage of justice. Indeed,

Hill's complete miscarriage of justice standard applies to non-constitutional errors; it would be circuitous and illogical to require a Guidelines application error to amount to a constitutional violation before the Court can deem the error results in a complete miscarriage of justice.

The error here – a violation of the law established in *Begay/Archer/McGill* – is no "ordinary" Guidelines application error. "*Begay* announced a new substantive rule of law." *Kendrick v. United States*, Case Nos. 5:08-cv-447-Oc-10GRJ, 5:03-cr-63-Oc-10GRJ2009, 2009 WL 2958976, at *2 (M.D. Fla. Sept. 15, 2009). Additionally, "*Archer* represents a clear and dramatic break from prior precedent involving an important substantive issue as distinguished from a procedural question or clarification of original intent." *Id.* The Court agrees with these opinions of Judge Terrell Hodges – what constitutes "crimes of violence" was substantively changed by *Begay*, *Archer*, and now, *McGill*. Significantly, the application note of the Guidelines, "[u]nlawfully possessing a [sawed-off shotgun] is a 'crime of violence,' U.S.S.G. § 4B1.2 (application notes), is at odds with the legal principle set forth by *Begay/Archer/McGill*. The cases relied upon in the Report, *Harris*, 2011 WL 5834749, and *Gonzalez*, 2012 WL 279451, are less persuasive on this issue.[8]

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[8] The *Harris* court relied on *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004), and *Burke v. United States*, 152 F.3d 1329, 1331-32 (11th Cir. 1998), to support its conclusion that a challenge to a trial court's application of the Sentencing Guidelines was "a non-constitutional issue that provides no basis for

The identified defect undermines the validity of Beckles's sentencing proceedings. At the sentencing hearing, the Court commented that it was a "sad testament" that Beckles was going to be sentenced to a term of imprisonment far in excess of anything he had previously experienced (Sentencing Tr. dated Oct. 17, 2007, at 42:10-12); because he received such lenient sentences for his prior state court convictions, the gravity of Beckles's state crimes was not impressed upon him through his punishments. The Court ultimately sentenced Beckles to the low-end of the Guidelines. (*See id.* 43:10-12). In declining to downward depart from the Guidelines, the undersigned emphasized that "[t]he Sentencing Commission established certain minimum offense levels where the weapon possessed is a sawed-off shotgun," a reference to the application note of U.S.S.G. section 4B1.2 and the PSI. (*See* PSI 6). The Court continued: "I am not persuaded, notwithstanding that I agree with

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collateral relief." *Harris*, 2011 WL 5834749, at *3. The citation to *Lynn*, however, merely explains that a Section 2255 motion "may not be a surrogate for a direct appeal," *Lynn*, 152 F.3d at 1232, which is not at issue here; and the issue presented in *Burke* – whether a post-conviction clarifying amendment to the Guidelines presented a cognizable non-constitutional issue – is distinguishable from the question raised by Beckles. As to *Gonzalez*, the court there reasoned in part that the Sentencing Guidelines application error at issue was "ordinary" because such an error could not be "inconsistent with the rudimentary demands of fair procedure" in a system of "unbounded sentencing discretion." *Gonzalez*, 2012 WL 279451, at *5 (citation omitted). For the reasons previously stated, *see supra* 13-14, the Court does not have "unbounded sentencing discretion" and therefore finds *Gonzalez* inapplicable.

[Beckles's counsel] that [Beckles was] not appropriately sentenced in the State Court, to depart from the advisory Guideline range here. " (Sentencing Tr. dated Oct. 17, 2007, at 42:25-43:2). In sum, the record reflects (and is consistent with the undersigned's recollection) that but for the minimum offense levels assigned by the Sentencing Commission, the Court *would not have* imprisoned Beckles to 360 months, a term substantially greater than a sentence within a corrected range of 262 to 327 months. Thus, although the imposed 360-month sentence does not exceed the statutory maximum, such a sentence could only be reimposed under the SRA if the Court had a separate reason that could justify departing upward from the corrected range. No such reasoning was expressed at the Sentencing Hearing – quite the contrary. As such, on this record, a 360-month sentence is invalid without the career offender enhancement because it involves a "clear error of judgment" by this sentencing court in weighing the Section 3553[9] factors. *See Wetherald*, 636 F.3d at 1322.

Beckles's case contrasts sharply with the circumstances in *Ayuso v. United States*, 361 F. App'x 988 (11th Cir. 2010), where the court found the district court's proceedings lacked any fundamental defect. There, the petitioner argued that he was improperly assessed an additional one criminal history point because after sentencing he successfully moved the state court to vacate a prior petty larceny conviction (which

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[9] 18 U.S.C. § 3553.

supported the added criminal history point in the petitioner's sentencing calculations) in place of a *nolo contendere* plea. *See id.* at 989-90. At the time of the petitioner's sentencing, the district court correctly calculated the petitioner's criminal history points based on a then-accurate criminal history record. Moreover, petitioner's argument was meritless as a *nolo contendere* plea would not have altered the number of criminal history points assigned to him. *See id.* at 991. Thus, the petitioner failed to demonstrate both any defect in the district court's sentencing proceedings and any resultant prejudice.

The situation presented by Beckles is most similar to the circumstances presented in *Kendrick*. There, the petitioner, Kendrick, was convicted of possessing cocaine base or crack cocaine with intent to distribute it. At sentencing, he was classified as a "career offender" because of prior convictions that the court treated as felony "crimes of violence," one of which was a conviction for carrying a concealed firearm. The "career offender" classification resulted "in a substantial enhancement of [the petitioner's] Guidelines sentence" from 16 criminal history points to an offense level of 29. *Kendrick*, 2009 WL 2958976, at *1. The court found that because a "clear and dramatic break" from a "substantive rule of law" no longer rendered carrying a concealed firearm a crime of violence, Kendrick was incorrectly classified as a "career offender" and was entitled to resentencing. *Id.* at *2.

Here, Beckles's crime of unlawfully possessing a sawed-off shotgun does not suffice as a "crime of

violence." Just as in *Kendrick*, one of the three "crimes of violence" necessary to sentence Beckles as a "career offender" is lacking. *See* U.S.S.G. § 4B1.1. That the crime at issue in Beckles is the instant offense, as opposed to an underlying offense, is a distinction without a difference, as the Guidelines require that both the instant offense as well as a minimum of two underlying offenses be either crimes of violence or controlled substance offenses.

The Court makes clear that the circumstances presented here, on this record, are "exceptional," as the Court specifically remarked at Beckles's sentencing hearing that the sentence imposed was due to his career offender status – which was designated in contravention of *Begay/Archer/McGill*. Thus, the subsequent change in the law, although it may not have rendered Beckles's sentence "unlawful,"[10] has rendered his sentencing proceedings "irregular and invalid" given the available record. *Addonizio*, 442 U.S. at 186. As such, the "need for the remedy afforded [under Section 2255]

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[10] The Court notes that its decision is not at odds with *Sun Bear v. United States*, 644 F.3d 700 (8th Cir. 2011) ("*Sun Bear II*"). In *Sun Bear v. United States*, 611 F.3d 925, 929 (8th Cir. 2010) ("*Sun Bear I*"), the court granted Section 2255 relief because "a post-conviction change in the law render[ed] unlawful the district court's sentencing determination." *Id.* at 930. That decision was overturned when the court reheard the case *en banc*. Specifically, the *en banc* panel held: "Sun Bear's 360-month sentence is not unlawful. An unlawful or illegal sentence is one imposed without, or in excess of, statutory authority." *Sun Bear II*, 644 F.3d at 705.

is apparent." *Hill*, 368 U.S. 424, at 428. For these reasons, the Court finds Beckles's challenge to his sentence is cognizable under Section 2255.

IV. CONCLUSION

Accordingly, it is

ORDERED AND ADJUDGED that the Report of Magistrate Judge **[ECF No. 21]** is **NOT ADOPTED**. The Motion **[ECF No. 1]** is **GRANTED**. A new sentencing hearing will be scheduled under separate Order in Beckles's criminal case after the time for filing an appeal here has expired, or an appeal is concluded. Judgment in favor of Movant, Travis Beckles, and against Respondent, the United States of America, shall be set forth on a separate document entered in the civil docket. *See* FED. R. CIV. P. 58, 79(a).

DONE AND ORDERED in Chambers at Miami, Florida, this 4th day of March, 2013.

/s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
UNITED STATES
DISTRICT JUDGE

cc: Magistrate Judge Andrea M. Simonton
counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 10-23517-CIV-ALTONAGA/Simonton

TRAVIS BECKLES,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent. /

ORDER

(Entered Jun. 14, 2013)

THIS CAUSE came before the Court on the United States's Motion to Reconsider Based on Intervening Eleventh Circuit Decision ("Motion") [ECF No. 39], filed May 30, 3013 [sic]. The relief sought is evident from the title of the Motion, and the parties are familiar with the decision the Government seeks reconsideration of (*see* Order of March 4, 2013 ("March 4 Order") [ECF No. 34]). In response to the Motion, Movant, Travis Beckles, acknowledges that the undersigned is bound by the Eleventh Circuit's recent decision in *United States v. Hall*, 714 F.3d 1270 (11th Cir. 2013), but "posits" that the Eleventh Circuit reached the "wrong conclusion" in *Hall*. (*See* Resp. 2 [ECF No. 41]). Movant asks the Court not to reconsider its March 4 Order, ignoring the binding effect of *Hall*. This, the undersigned will not do. Accordingly, it is

ORDERED AND ADJUDGED that the Motion to Reconsider **[ECF No. 39] is GRANTED**. The Order of March 4, 2013 and Final Judgment [ECF No. 35] are **SET ASIDE**. Movant's Section 2255 Motion [ECF No. 1] is **DENIED**. A certificate of appealability is granted, as the many legal memoranda filed demonstrate that "jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citation omitted).

DONE AND ORDERED in Miami, Florida, this 14th day of June, 2013.

/s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
UNITED STATES
DISTRICT JUDGE

cc: counsel of record

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-13569 Non-Argument Calendar

D.C. Docket Nos. 1:10-cv-23517-CMA,
1:07-cr-20305-CMA-1

TRAVIS BECKLES,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(September 5, 2014)

Before WILSON, ANDERSON, and EDMONDSON, Circuit Judges.

PER CURIAM:

Travis Beckles, a federal prisoner serving a 216-month sentence for possessing a sawed-off shotgun as a convicted felon, appeals the denial of his counseled 28 U.S.C. § 2255 motion to vacate his sentence. In his

§ 2255 motion, Beckles claimed that he was improperly sentenced as a career offender under U.S.S.G. § 4B1.1 because his conviction for possession of a sawed-off shotgun was not a "crime of violence." The district court ultimately denied the claim, citing our decision in *United States v. Hall*, 714 F.3d 1270 (11th Cir. 2013).

On appeal, Beckles acknowledges that *Hall* forecloses his claim, but contends that the case was wrongly decided. For the following reasons, we affirm.

I.

In a § 2255 proceeding, we review questions of law *de novo*. *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004). We are bound by the opinion of a prior panel unless the Supreme Court or this Court sitting *en banc* overrules that opinion. *United States v. Lawson*, 686 F.3d 1317, 1319 (11th Cir. 2012).

Under § 4B1.1 of the Sentencing Guidelines, a defendant who is convicted of a felony crime of violence or a controlled substance offense, and who already had two prior such convictions, is subject to an enhanced sentence for being a career offender. U.S.S.G. § 4B1.1(a). The term "crime of violence" includes "any offense under . state law, punishable by imprisonment for a term exceeding one year, that involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a).

The commentary to § 4B1.2(a) explicitly states that "[u]nlawfully possessing a firearm described in

26 U.S.C. § 5845(a) (*e.g.*, a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence.'" U.S.S.G. § 4B1.2 cmt. n. 1. Commentary in the Sentencing Guidelines that interprets a guideline "is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 508 U.S. 36, 37, 113 S.Ct. 1913, 1915, 123 L.Ed.2d 598 (1993).

In *Begay v. United States*, 553 U.S. 137, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008), the Supreme Court concluded that an offense is a "violent felony" under the Armed Career Criminal Act ("ACCA") – which defines the term using language nearly identical to the definition of "crime of violence" under U.S.S.G. § 4B1.2(a) – only if it is "roughly similar, in kind as well as in degree of risk posed" to the ACCA's enumerated crimes of burglary of a dwelling, arson, extortion, or unlawful use of explosives. *See Begay*, 553 U.S. at 143, 128 S.Ct. at 1585. Applying *Begay*, in *United States v. McGill*, 618 F.3d 1273 (11th Cir. 2010), we concluded that a prior conviction for mere possession of a sawed-off shotgun, is not a "violent felony" under the ACCA. *McGill*, 618 F.3d at 1277.

In *Hall*, we decided that possession of an unregistered sawed-off shotgun, as defined by 26 U.S.C. § 5861(d), qualifies as a "crime of violence" under § 4B1.2(a), based on the commentary to that guideline provision. *Hall*, 714 F.3d at 1273. We explained that the commentary was controlling over *Begay* and *McGill*, because the commentary did not violate the Constitution

or a federal statute, and was not inconsistent with, or a plainly erroneous reading of, the guideline text. *Id.* at 1273-74.

Here, Beckles's claim fails on the merits under *Hall*, and we are bound by that decision.

AFFIRMED.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

June 30, 2015

Clerk
United States Court of Appeals for
the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: Travis Beckles
v. United States
No. 14-7390
(Your No. 13-13569)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of Johnson v. United States, 576 U. S. ___ (2015). Justice Kagan took no part in the consideration or decision of this motion and this petition.

Justice Alito concurring in the decision to grant, vacate, and remand in this case: Following the recommendation of the Solicitor General, the Court has held

the petition in this and many other cases pending the decision in Johnson v. United States, 576 U. S. ___ (2015). In holding these petitions and now in vacating and remanding the decisions below in these cases, the Court has not differentiated between cases in which the petitioners would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act of 1984, 18 U. S. C. Sec. 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Court of Appeals should understand that the Court's disposition of this petition does not reflect any view regarding petitioner's entitlement to relief.

The judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45. Should a petition for rehearing be filed timely, the judgment or mandate will be further stayed pending this Court's action on the petition for rehearing.

Sincerely,

/s/ Scott S. Harris
Scott S. Harris, Clerk

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-13569
Non-Argument Calendar

D.C. Docket Nos. 1:10-cv-23517-CMA,
1:07-cr-20305-CMA-1

TRAVIS BECKLES,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(September 29, 2015)

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before WILSON, ANDERSON, and EDMONDSON, Circuit Judges.

PER CURIAM:

In this appeal, Travis Beckles challenged the district court's denial of his counseled 28 U.S.C. § 2255 motion to vacate his sentence. *See Beckles v. United States*, 579 F. App'x 833 (11th Cir. 2014) (unpublished). Beckles argued that he was sentenced improperly as a career offender under U.S.S.G. § 4B1.1; he contends his conviction for unlawful possession of a sawed-off shotgun was no "crime of violence." *Id.* We affirmed the district court's ruling, concluding that Beckles's argument was foreclosed by our decision in *United States v. Hall*, 714 F.3d 1270 (11th Cir. 2013). *Id.* The Supreme Court has now vacated our decision and remanded the case to us for additional consideration in the light of *Johnson v. United States*, 135 S.Ct. 2551 (2015). After additional review, we affirm.

Beckles was sentenced properly as a career offender under U.S.S.G. § 4B1.1. Beckles had at least two prior felony convictions for drug offenses. And Beckles's offense of conviction – unlawful possession of a sawed-off shotgun – constitutes a "crime of violence" under section 4B1.1. *See* U.S.S.G. § 4B1.2 cmt. n.1 (providing expressly that the unlawful possession of "a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence.'"); *Hall*, 714 F.3d at 1274 (concluding that the Guidelines commentary in U.S.S.G. § 4B1.2 is binding and, thus, that the possession of a sawed-off shotgun qualifies as a "crime of violence").

The Supreme Court's decision in *Johnson* – in which the Supreme Court struck down, as unconstitutionally vague, the residual clause of the Armed Career Criminal Act ("ACCA") – does not control this appeal. Beckles was sentenced as a career offender based *not* on the ACCA's residual clause, but based on express language in the Sentencing Guidelines classifying Beckles's offense as a "crime of violence." *Johnson* says and decided nothing about career-offender enhancements under the Sentencing Guidelines or about the Guidelines commentary underlying Beckles's status as a career-offender.

Our decision in *Hall* remains good law and continues to control in this appeal. *See Atl. Sounding Co., Inc. v. Townsend*, 496 F.3d 1282, 1284 (11th Cir. 2007) ("Under our prior panel precedent rule, a later panel may depart from an earlier panel's decision only when the intervening Supreme Court decision is 'clearly on point."). Accordingly, we affirm.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-13569-BB

TRAVIS BECKLES,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON SUPREME COURT REMAND

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Filed Feb. 11, 2016)

BEFORE: WILSON, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

(Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J L Edmondson
UNITED STATES CIRCUIT JUDGE

RECORD AND BRIEFS

No. 15-8544

Supreme Court, U.S.
FILED
AUG 11 2016
OFFICE OF THE CLERK

In The Supreme Court of the United States

TRAVIS BECKLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

In *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), the Court declared unconstitutionally vague the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii). The residual clause of the career offender provision of the United States Sentencing Guidelines, U.S.S.G. § 4B1.2(a)(2), contains identical language and is governed by the same analytical framework as the residual clause invalidated in *Johnson*.

The questions presented are:

1. Whether the residual clause in U.S.S.G. § 4B1.2(a)(2) is void for vagueness in light of *Johnson*, thereby rendering Petitioner's challenge to his career offender sentence cognizable under 28 U.S.C. § 2255(a).

2. Whether *Johnson* has retroactive effect in this collateral proceeding.

3. Whether Petitioner's conviction for unlawful possession of a sawed-off shotgun, an offense listed as a "crime of violence" only in the commentary to U.S.S.G. § 4B1.2, qualifies as a "crime of violence" after *Johnson*.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings below.

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OPINIONS BELOW

The unpublished opinion of the court of appeals issued prior to *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015) (JA 155-58) is reported at 579 F. App'x 833. The unpublished opinion of the court of appeals on remand from this Court for reconsideration in light of *Johnson* (JA 161-63) is reported at 616 F. App'x 415. The unpublished order of the court of appeals denying rehearing and rehearing en banc (JA 164-65) is unreported. The relevant orders of the district court (JA 127-54) are unreported, as is the report of the magistrate judge (JA 80-126). The opinion of the court of appeals on direct appeal (JA 15-40) is reported at 565 F.3d 832.

JURISDICTION

The decision of the court of appeals on remand from this Court was issued on September 29, 2015. The court of appeals denied a timely petition for rehearing and rehearing en banc on February 11, 2016. The petition for writ of certiorari was timely filed on March 9, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and United States Sentencing Guidelines provisions are reprinted in the appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

In *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), the Court declared the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), void for vagueness in violation of the Due Process Clause. The following Term, the Court held that *Johnson* announced a "substantive" rule that has retroactive effect in cases on collateral review. *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016). Mr. Beckles's sentence was enhanced pursuant to the residual clause of the "career offender" provision of the United States Sentencing Guidelines, U.S.S.G. § 4B1.2(a)(2). The text of § 4B1.2(a)(2)'s residual clause is identical – word-for-word – to the residual clause invalidated in *Johnson*, and the same analytical framework governs the interpretation of both. This case requires the Court to confirm that *Johnson* renders the career offender guideline's indistinguishable residual clause void for vagueness, that *Johnson* has retroactive effect in this collateral case, and that applying *Johnson* to this case results in relief.

A. The Career Offender Guideline

In the Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217, 98 Stat. 1837, 2017-2026 (1984), Congress established the United States Sentencing Commission and charged it with, *inter alia*, "establish[ing] sentencing policies and practices for the Federal Criminal justice system." 28 U.S.C. § 991(b)(1). "The Commission, however, was not granted unbounded discretion. Instead, Congress articulated general goals for federal sentencing and imposed upon the Commission a variety of specific requirements." *United States v. LaBonte*, 520 U.S. 751, 753 (1997) (citing 28 U.S.C. §§ 994(b)-(n)).

Among those goals, Congress mandated that the Commission "assure" that a certain category of offenders receive a sentence of imprisonment "at or near the maximum term authorized." 28 U.S.C. § 994(h). United States Sentencing Guidelines § 4B1.1, known as the "career offender" guideline, implements that congressional mandate. U.S.S.G. § 4B1.1 cmt. background (2015). The career offender guideline creates a "category of offender subject to particularly severe punishment." *Buford v. United States*, 532 U.S. 59, 60 (2001). It does this by generally prescribing enhanced offense levels and automatically placing career offenders in criminal history category VI, the highest category available under the Guidelines. *See* § 4B1.1(b); *LaBonte*, 520 U.S. at 753-54. Thus, no matter how short a sentence the Guidelines might otherwise call for, if a defendant is designated a career offender, he is placed in the worst class of offenders, facilitating a sentence

"at or near" the statutory maximum, as Congress required.

The career offender guideline applies to a defendant who is at least eighteen years of age, commits an offense that is a "crime of violence" or a controlled substance offense, and has at least two prior felony convictions for a "crime of violence" or a controlled substance offense. *See* § 4B1.1. The term "crime of violence" is defined in U.S.S.G. § 4B1.2(a). In 1989, the Sentencing Commission discarded § 4B1.2(a)'s prior definition of "crime of violence" and replaced it with one "derived from" the ACCA. *See* U.S.S.G. app. C, amend. 268 (Reason for Amendment) (1989). The definition of "crime of violence" the Commission adopted "closely track[ed] ACCA's definition of 'violent felony.'" *James v. United States*, 550 U.S. 192, 206 (2007), *overruled in other part by Johnson*, 135 S. Ct. at 2563. Indeed, the two provisions nearly mirrored each other. *Compare* § 924(e)(2)(B) (1989) *with* U.S.S.G. § 4B1.2(a) (1989).

That symmetry remained true when Mr. Beckles was sentenced in 2006. *Compare* § 924(e)(2)(B) (2006) *with* U.S.S.G. § 4B1.2(a) (2006). Section 4B1.2(a) then defined a "crime of violence" to include "any offense under federal or state law punishable by imprisonment for a term exceeding one year, that – (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." § 4B1.2(a) (2006) (emphasis added). These

latter fifteen words, known as the residual clause, are the very same fifteen words that this Court declared unconstitutionally vague in *Johnson*. *See Johnson*, 135 S. Ct. at 2555, 2563.[1]

In addition to the offenses enumerated as "crimes of violence" in the text of § 4B1.2(a), the guideline commentary lists other offenses which the Sentencing Commission has determined either do or do not qualify as a "crime of violence." § 4B1.2 cmt. n.1. The offenses defined as "crime[s] of violence" in the commentary have changed over time. *Compare, e.g.*, § 4B1.2 cmt. n.1 (1987) *with id.* (2015). At the time relevant here, the commentary specified that "unlawful possession of a firearm by a felon" was *not* a crime of violence "unless the possession was of a firearm described in 26 U.S.C. § 5845(a)," which includes sawed-off shotguns. § 4B1.2 cmt. n.1 (2006); *see id.* ("Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (*e.g.*, a sawed-off

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[1] These same fifteen words comprised § 4B1.2(a)(2)'s residual clause until August 1, 2016, when the Sentencing Commission deleted them. *See* U.S.S.G. § 4B1.2 (eff. Aug. 1, 2016). The Sentencing Commission explained that its amendment to § 4B1.2 was "informed by" *Johnson*. U.S.S.G. app. C, amend. 798 (Reason for Amendment) (Aug. 1, 2016). It declined to make the amendment retroactive. Remarks for Public Meeting, Chief Judge Patti B. Saris, Chair, U.S. Sent'g Comm'n, at 4 (Jan. 8, 2016), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160108/remarks.pdf. Unless otherwise indicated, all references hereafter are to the pre-amendment version of § 4B1.2.

shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence.'").[2]

B. Petitioner is Sentenced as a Career Offender

In 2007, Mr. Beckles was charged with one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1), and the jury convicted him as charged. JA 129. Following trial, a presentence investigation report prepared for the district court relied on the commentary to § 4B1.2 to recommend that Mr. Beckles be sentenced as a career offender, because the firearm he possessed was a sawed-off shotgun. JA 130. Mr. Beckles's designation as a career offender meant that he was assigned an enhanced offense level of 37 and a criminal history category of VI,[3] which corresponded to a Sentencing Guidelines imprisonment range of 360 months to life. *See id.* Without the career offender enhancement, Mr. Beckles's criminal history category would have remained the same, but his offense level would have dropped to 34, resulting in an imprisonment range of 262 to 327 months. *See id.*

The district court declined to sentence Mr. Beckles outside the sentencing range established by the career offender guideline and imposed a 360-month term of imprisonment. JA 85, 132. At the sentencing hearing,

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[2] Section 5845(a) instructs that "[t]he term 'firearm'" includes "a shotgun having a barrel or barrels of less than 18 inches in length." 26 U.S.C. § 5845(a).

[3] Mr. Beckles had 12 criminal history points.

the district court explained to Mr. Beckles that it would not impose a lesser sentence, because it was swayed by the government's argument "referring the Court back to Congress's mandate as it pertains to career offenders such as yourself, and Congress has spoken and directed the Sentencing Commission that the Guideline for career offenders should specify a sentence to a term of imprisonment at or near the maximum term authorized." JA 131-32. The district court later stated that the record "reflects (and is consistent with undersigned's recollection) that but for the minimum offense levels assigned by the Sentencing Commission, the Court *would not have* imprisoned Beckles for 360 months, a term substantially greater than a sentence within the [non-enhanced] range of 262 to 327 months." JA 149 (emphasis in original).

The United States Court of Appeals for the Eleventh Circuit affirmed Mr. Beckles's conviction and sentence. JA 40. Pertinent here, it relied on the commentary to § 4B1.2 characterizing possession of a sawed-off shotgun as a "crime of violence" to reject Mr. Beckles's argument that he was wrongly sentenced as a career offender. JA 29-30 (citing § 4B1.2 cmt. n.1). This Court denied certiorari in October 2009. *Beckles v. United States*, 558 U.S. 906 (2009) (Mem.). The district court subsequently reduced Mr. Beckles's term of imprisonment to 216 months pursuant to Federal Rule of Criminal Procedure 35(b) for reasons not relevant here. JA 132-33.

C. Petitioner's 28 U.S.C. § 2255 Proceedings

1. The Proceedings Before the District Court

In 2010, Mr. Beckles timely filed a 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence in which he alleged that he was wrongly sentenced as a career offender because possession of a sawed-off shotgun was not a "crime of violence" under § 4B1.2(a)(2)'s residual clause. JA 41-52. In support of this argument, Mr. Beckles relied on *Begay v. United States*, 553 U.S. 137 (2008), *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008), *United States v. McGill*, 618 F.3d 1273 (11th Cir. 2010), and the Due Process Clause. JA 45, 71. *McGill* applied *Begay* to hold that possession of a sawed-off shotgun was not a violent felony under the ACCA's residual clause. *McGill*, 618 F.3d at 1279. *Archer* held that the definition of "violent felony" in the ACCA is "virtually identical" to the definition of "crime of violence" in § 4B1.2(a)(2). 531 F.3d at 1352. The government opposed relief solely on the ground that Mr. Beckles's challenge to his career offender enhancement was not cognizable in a § 2255 proceeding. *See* JA 53-69, 133.[4]

The district court, however, held that the claim was cognizable, and concluded that Mr. Beckles had

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[4] A federal prisoner may move to vacate, set aside, or correct a sentence only on the grounds "that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a).

been wrongly sentenced as a career offender under *Begay* and *McGill*. JA 152. Noting that it "specifically remarked at Beckles's sentencing hearing that the sentence imposed was due to his career offender status," and noting further that it would have applied the same degree of reduction to Mr. Beckles's sentence pursuant to Rule 35(b) even if it had not sentenced him as a career offender, the district court granted the motion and ordered resentencing without the career offender enhancement. JA 144, 151-52.

After the time for appeal had passed, the government moved for reconsideration of the district court's order based on an intervening Eleventh Circuit decision, *United States v. Hall*, 714 F.3d 1270 (11th Cir. 2013). JA 153. *Hall* held that § 4B1.2's commentary defining "crime of violence" to include possession of a sawed-off shotgun was binding on the federal courts under *Stinson v. United States*, 508 U.S. 36 (1993), notwithstanding *Begay* and *McGill*:

> Although we would traditionally apply the categorical approach to determine whether an offense qualifies as a "crime of violence," we are bound by the explicit statement in the commentary that "[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (*e.g.*, a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence.'" U.S.S.G. § 4B1.2 cmt. n.1. Hall does not satisfy either of *Stinson*'s stringent exception requirements, as the commentary provision violates neither the Constitution nor any other federal statute, and it is not inconsistent

> with, or a plainly erroneous reading of, the guideline text itself. Moreover, because the commentary to § [4B1.2] defines "crime of violence" very differently than the ACCA does, we cannot say that the definition of "crime of violence" provided in the commentary to § [4B1.2] is a plainly erroneous reading of the guideline.

Hall, 714 F.3d at 1274 (brackets in original; internal quotation marks and ellipsis omitted). The district court granted reconsideration in light of *Hall*, set aside its prior final judgment, and denied Mr. Beckles's § 2255 motion. JA 153-54.

2. The Eleventh Circuit's Decisions

On appeal, the Eleventh Circuit determined that it was bound by *Hall* to conclude that possession of a sawed-off shotgun was a "crime of violence" for purposes of § 4B1.2. JA 157-58 (citing *Hall*, 714 F.3d at 1273). Accordingly, it affirmed the district court's denial of Mr. Beckles's § 2255 motion. *Id.*

After this Court granted review in *Johnson* to consider whether possession of a sawed-off shotgun was a "violent felony" under the ACCA, Mr. Beckles petitioned for a writ of certiorari on the closely-related question of whether that same offense qualified as a "crime of violence" under U.S.S.G. § 4B1.2. *See* Petition for Writ of Certiorari at i, *Beckles v. United States*, ___ U.S. ___, 135 S. Ct. 2928 (2015) (No. 14-7390). Four days after it decided *Johnson*, the Court granted Mr.

Beckles's petition, vacated the Eleventh Circuit's judgment, and remanded for further consideration in light of *Johnson*. JA 159; *Beckles v. United States*, ___ U.S. ___, 135 S. Ct. 2928 (2015).

Before Mr. Beckles's case was reconsidered on remand, however, another panel of the Eleventh Circuit held that the advisory Sentencing Guidelines were immune from vagueness challenges, and therefore *Johnson* did not invalidate the residual clause in § 4B1.2(a)(2). *United States v. Matchett*, 802 F.3d 1185, 1194-96 (11th Cir. 2015), *petition for rhg. en banc filed* (Oct. 13, 2015) (No. 14-10396). Eight days after *Matchett*, the Eleventh Circuit again rejected Mr. Beckles's challenge to his career offender sentence. JA 161-63. As it did pre-*Johnson*, the court of appeals cited *Hall* and the commentary to § 4B1.2 to support its conclusion that "Beckles's offense of conviction – unlawful possession of a sawed-off shotgun – constitutes a 'crime of violence' under [U.S.S.G. §] 4B1.1." JA 162 (citing § 4B1.2 cmt. n.1; *Hall*, 714 F.3d at 1274). Without mentioning *Matchett*, the Eleventh Circuit specifically determined that *Johnson* did not apply either to the career offender provision of the Sentencing Guidelines or its commentary, stating:

> The Supreme Court's decision in *Johnson* – in which the Supreme Court struck down, as unconstitutionally vague, the residual clause of the Armed Career Criminal Act ("ACCA") – does not control this appeal. Beckles was sentenced as a career offender based *not* on the ACCA's residual clause, but based on express

> language in the Sentencing Guidelines classifying Beckles's offense as a "crime of violence." *Johnson* says and decided nothing about career-offender enhancements under the Sentencing Guidelines or about the Guidelines commentary underlying Beckles's status as a career-offender. [¶] Our decision in *Hall* remains good law and continues to control this appeal.

JA 163 (emphasis in original).

The Eleventh Circuit denied Mr. Beckles's timely petition for rehearing and rehearing en banc. JA 164. This Court subsequently granted certiorari. *Beckles v. United States*, ___ S. Ct. ___, 2016 WL 1029080 (June 27, 2016) (Mem.) (No. 15-8544).

SUMMARY OF ARGUMENT

I. The residual clause in United States Sentencing Guideline § 4B1.2(a)(2) is void for vagueness under the Due Process Clause. In *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), the Court invalidated the residual clause in the Armed Career Criminal Act ("ACCA") as unconstitutionally vague. It did so because interpreting the ACCA's residual clause "requires a court to picture the kind of conduct that the crime involves in the 'ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." *Id.* at 2557 The Due Process Clause, the Court explained, could not tolerate the unpredictability and arbitrariness generated by a legal

provision requiring such wide-ranging inquiry. *Id.* The residual clause in § 4B1.2(a)(2) contains the same fifteen words as the residual clause invalidated in *Johnson*, and it is interpreted using the same "ordinary case" analysis. As a result, lower courts and this Court have interpreted these two provisions interchangeably. Because these two residual clauses contain identical text and are analytically indistinguishable, *Johnson*'s holding compels the conclusion that § 4B1.2(a)(2)'s residual clause is similarly void for vagueness.

That § 4B1.2(a)(2) is a Guideline makes no difference. The Court has sustained constitutional challenges to the Sentencing Guidelines, and the Due Process Clause's prohibition on vagueness is not limited to statutes. For example, the Court has invalidated agency regulations as unconstitutionally vague. That precedent is particularly instructive here because the Guidelines are the "equivalent" of agency regulations. *Stinson v. United States*, 508 U.S. 36, 45 (1993). Also instructive is *Peugh v. United States*, 569 U.S. ___, 133 S. Ct. 2072 (2013), which held that the advisory Guidelines are subject to the Ex Post Facto Clause. Indeed, the ex post facto violation recognized there was premised on the Guidelines being intelligible. And, like the Ex Post Facto Clause, the Due Process Clause's prohibition on vagueness ensures fair notice and prevents arbitrary enforcement. Section 4B1.2(a)(2)'s residual clause flouts those dual objectives no less than the residual clause invalidated in *Johnson*. Furthermore, because the Guidelines serve as the very foundation of the federal sentencing regime, they cannot be immune

from the fundamental requirements of due process. Permitting vague guidelines to contaminate the sentencing matrix would infect all stages of the criminal justice process, guarantee unwarranted sentencing disparities, and prevent the Guidelines from fulfilling their role as the uniform baseline for sentencing. The federal sentencing regime would collapse on its foundation.

It is therefore unsurprising that the clear majority view is that *Johnson* invalidates § 4B1.2(a)(2)'s residual clause. The United States has even conceded that point in courts around the country and now in this Court. And, with the lone exception of the court below, the courts of appeals have either held or assumed that *Johnson* renders § 4B1.2(a)(2)'s residual clause invalid. The Court should declare the residual clause in § 4B1.2(a)(2) void for vagueness, thereby rendering Mr. Beckles's challenge to his career offender enhancement cognizable on collateral review.

II. *Johnson* has retroactive effect in this collateral proceeding. *Johnson* announced the following rule of constitutional law: a legal provision is void for vagueness under the Due Process Clause where it "requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." 135 S. Ct. at 2557; *see Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257, 1272 (2016) (Thomas, J., dissenting) (articulating rule of *Johnson*). Under *Teague v. Lane*, 489 U.S. 288 (1989)

and its progeny, this Court applies a three-step analysis for determining whether a rule announced in one of its decisions has retroactive effect. Each step is easily resolved here.

First, the Court asks when the petitioner's conviction became final. Here, Mr. Beckles's conviction became final in 2009 when this Court denied his petition for a writ of certiorari to review his conviction and sentence. Second, the Court asks whether the rule upon which the petitioner relies is "new." Here, *Johnson*'s rule is new as to Mr. Beckles because it was announced several years after his conviction became final, and it expressly overruled precedent foreclosing a vagueness challenge. Third, because the rule relied upon is new, the Court asks whether it meets one of the exceptions to nonretroactivity as either a "substantive" rule or a "watershed" rule of procedure. Here, this Court has already resolved that question, holding just last Term that *Johnson* announced a substantive rule that has retroactive effect in cases on collateral review. *Welch*, 136 S. Ct. at 1268. Accordingly, it has retroactive effect in this case.

That conclusion must be true because, under *Teague*, retroactivity is a "categorical" matter: new rules satisfying one of the two exceptions to nonretroactivity must "be applied to *all* defendants on collateral review." *Teague*, 489 U.S. at 316 (emphasis in original). Indeed, since *Teague*, this Court has never given a rule retroactive effect to some cases on collateral review, but not others. This is so because retroactivity is based on the rule itself, not the context in

which it is invoked. Thus, when this Court declares a new rule to be substantive, as it did in *Welch* vis-a-vis *Johnson*, that rule necessarily has retroactive effect in all collateral cases. Of course, that a substantive rule has retroactive effect "to all defendants on collateral review" hardly means that a particular defendant will obtain relief as a result of that rule. In this case, for example, Mr. Beckles must show that *Johnson* invalidates § 4B1.2(a)(2)'s residual clause and that he is no longer a career offender as a result. But those issues go to the cognizability and merits of his claim, not the retroactivity of the rule upon which he relies.

Johnson's retroactive application to this case is compelling for other reasons as well. As a matter of logic and symmetry, it cannot be that *Johnson* both invalidates the residual clause in § 4B1.2(a)(2) *and* announced a substantive rule, but does *not* have retroactive effect in Guidelines cases on collateral review. That type of incongruity must be rejected.

And that is all the more true given that the retroactivity analysis in *Welch* applies with full force here. The Court explained that *Johnson* had a substantive function because, by invalidating the residual clause, it "changed the substantive reach" of the ACCA, thereby "altering the range of conduct or the class of persons that the [Act] punishes." *Welch*, 136 S. Ct. at 1265 (internal quotation marks omitted). By contrast, the Court concluded that *Johnson* did not have a procedural function because it "had nothing to do with the range of permissible methods a court might use to determine whether a defendant should be sentenced

under the [ACCA]." *Id.* That exact same logic applies here: by invalidating the residual clause in § 4B1.2(a)(2), *Johnson* changed the substantive reach of the career offender guideline – its content – "rather than the judicial procedures by which [it] is applied." *Id.* After *Johnson*, a defendant, like Mr. Beckles, whose career offender sentence is based on the residual clause in § 4B1.2(a)(2) can no longer be sentenced as a career offender. That is a substantive change in the law.

III. After *Johnson*, Mr. Beckles's offense of conviction is not a "crime of violence." With the text of § 4B1.2 stripped of its residual clause, its commentary designating unlawful possession of a sawed-off shotgun as a "crime of violence" cannot survive. *Stinson* held that a guideline's commentary must yield where it "is inconsistent with, or a plainly erroneous reading," of the guideline it purports to interpret. 508 U.S. at 38. Here, with the residual clause excised from the text of § 4B1.2, the commentary's designation of Mr. Beckles's offense as a "crime of violence" becomes inconsistent with the text's remaining definitions of that term. Unlawful possession of a sawed-off shotgun is not one of the offenses enumerated in the text of § 4B1.2(a)(2). Nor does it have as an element the use, attempted use, or threatened use of physical force against the person of another under § 4B1.2(a)(1). Absent the residual clause, § 4B1.2's commentary identifying possession of a sawed-off shotgun as a "crime of violence" no longer explains or interprets that guideline's remaining text.

Therefore, the court below erred by relying on the commentary to § 4B1.2 to conclude that Mr. Beckles was properly sentenced as a career offender.

ARGUMENT

I. *JOHNSON* RENDERS THE RESIDUAL CLAUSE IN U.S.S.G. § 4B1.2(a)(2) VOID FOR VAGUENESS

The Due Process Clause of the Fifth Amendment provides: "No person shall be deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V. The government "violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551, 2556 (2015). This "prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" *Id.* at 2556-57 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

In *Johnson*, the Court held that the residual clause of the Armed Career Criminal Act of 1984 ("ACCA"), 18 U.S.C. § 924(e), was unconstitutionally void for vagueness. 135 S. Ct. at 2563. The ACCA defines a "violent felony" to include any felony that "is

burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). The latter half of § 924(e)(2)(B)(ii), italicized above, comprises the ACCA's residual clause. *Johnson*, 135 S. Ct. at 2556. The analytical framework employed to assess whether a conviction qualifies as a "violent felony" is known as the "categorical approach." *See id.* at 2557. In the context of the residual clause, the "categorical approach" requires courts to "picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." *Id.* (quoting *James v. United States*, 550 U.S. 192, 208 (2007), *overruled in other part by Johnson*, 135 S. Ct. at 2563).

Johnson determined that "[t]wo features of the residual clause conspire to make it unconstitutionally vague." *Id.* First, the "ordinary-case" analysis creates "grave uncertainty about how to estimate the risk posed by a crime." *Id.* And, second, the residual clause creates "uncertainty about how much risk it takes for a crime to qualify as a violent felony" because it "forces courts to interpret 'serious potential risk' in light of the four enumerated crimes" preceding it, and those enumerated crimes – burglary, arson, extortion, and crimes involving the use of explosives, *see* 18 U.S.C. § 924(e)(2)(B)(ii) – "are 'far from clear in respect to the degree of risk each poses.'" *Id.* at 2558 (quoting *Begay v. United States*, 553 U.S. 137, 143 (2008)). The combination of those uncertainties led the Court to conclude

that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges," thereby "produc[ing] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 2557-58.

A. *Johnson* Applies Equally to the Identical and Interchangeable Residual Clause in § 4B1.2(a)(2)

The text of the residual clause in United States Sentencing Guideline § 4B1.2(a)(2) is identical to that of the residual clause invalidated in *Johnson*. Section 4B1.2(a)(2) defines a "crime of violence" to include an offense that "is burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another* " § 4B1.2(a)(2) (emphasis added). Its residual clause, italicized here, is comprised of the exact same fifteen words as the residual clause in the ACCA that *Johnson* held void for vagueness. *Compare id. with* 18 U.S.C. § 924(e)(2)(B)(ii). And like the ACCA's residual clause, § 4B1.2(a)(2)'s residual clause "forces courts to interpret 'serious potential risk' in light of" four enumerated crimes, and the four crimes enumerated in § 4B1.2(a)(2) are virtually identical to those enumerated in the ACCA. *Compare* § 4B1.2(a)(2) ("burglary of a dwelling, arson, or extortion, involves use of explosives") *with* § 924(e)(2)(B)(ii) ("burglary, arson, or extortion, involves use of explosives").

But the text of the two residual clauses is not their only similarity. The same categorical approach and "ordinary case" analysis that rendered the ACCA's residual clause vague applies equally to § 4B1.2(a)(2)'s residual clause, and, as a result, the unanimous view of the courts of appeals is that the two residual clauses can be interchangeably interpreted, such that "decisions about one apply to the other." *Gilbert v. United States*, 640 F.3d 1293, 1309 n.16 (11th Cir. 2011) (en banc).[5] This Court shares that view. In *Johnson* itself, the Court relied on four circuit-court decisions interpreting § 4B1.2(a)(2)'s residual clause to support its conclusion that the ACCA's residual clause was unconstitutionally vague. 135 S. Ct. at 2559-60 (citing *United States v. Carthorne*, 726 F.3d 503 (4th Cir. 2013); *United States v. Whitson*, 597 F.3d 1218 (11th Cir. 2010) (per curiam); *United States v. McDonald*, 592 F.3d 808 (7th Cir. 2010); *United States v. Williams*, 559 F.3d 1143 (10th Cir. 2009)).

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[5] *See, e.g.*, *United States v. Velasquez*, 777 F.3d 91, 94-98 & n.1 (1st Cir. 2015); *United States v. Van Mead*, 773 F.3d 429, 432-33 (2d Cir. 2014); *United States v. Calabretta*, ___ F.3d ___, 2016 WL 3997215, at *4-5 (3d Cir. July 26, 2016); *United States v. Gomez*, 690 F.3d 194, 197 (4th Cir. 2012); *United States v. Mohr*, 554 F.3d 604, 609 & n.4 (5th Cir. 2009); *United States v. Ford*, 560 F.3d 420, 421-22 (6th Cir. 2009); *United States v. Griffin*, 652 F.3d 793, 802 (7th Cir. 2011); *United States v. Boose*, 739 F.3d 1185, 1187-88 & n.1 (8th Cir. 2014); *United States v. Park*, 649 F.3d 1175, 1177 (9th Cir. 2011); *United States v. Madrid*, 805 F.3d 1204, 1210-11 (10th Cir. 2015); *United States v. Hill*, 131 F.3d 1056, 1062 & n.6 (D.C. Cir. 1997).

Because the two residual clauses are identical and interchangeably interpreted, if one is void for vagueness, then so too is the other. The fifteen words comprising the residual clause do "not somehow magically become clearer or more meaningful because [they] appear in the guideline, rather than in the ACCA." *In re Clayton*, ___ F.3d ___, 2016 WL 3878156, at *12 (11th Cir. July 18, 2016) (No. 16-14556) (Rosenbaum, J., concurring). As this Court said in *Johnson*, the residual clause is "vague in all its applications." 135 S. Ct. at 2561. And interpretation of the residual clause in § 4B1.2(a)(2) is governed by the same indeterminate, wide-ranging "ordinary case" inquiry that *Johnson* concluded "denies fair notice to defendants and invites arbitrary enforcement by judges." *Id.* at 2557. In short, because the residual clauses in the ACCA and § 4B1.2(a)(2) are linguistically and analytically indistinguishable, *Johnson*'s rationale applies with equal force to § 4B1.2(a)(2)'s residual clause.

B. The Sentencing Guidelines Are Subject to the Due Process Clause's Prohibition on Vagueness

That this vagueness plagues a Sentencing Guideline rather than a statute is a distinction without a constitutional difference. The Guidelines are not uniquely immune from constitutional constraints. To the contrary, the Court has repeatedly addressed and even sustained constitutional challenges to them. *See, e.g.*, *Peugh v. United States*, 569 U.S. ___, 133 S. Ct.

2072 (2013) (application of advisory Guidelines violated Ex Post Facto Clause); *United States v. Booker*, 543 U.S. 220 (2005) (mandatory Guidelines violated Sixth Amendment); *Wade v. United States*, 504 U.S. 181, 185-86 (1992) (government's refusal to file substantial-assistance motion under Guidelines was "subject to constitutional limitations"); *Mistretta v. United States*, 488 U.S. 361 (1989) (Guidelines did not violate Constitution's structural features). And it has recognized – in the context of the career offender guideline in particular – that even the Guidelines's commentary must yield where it "violates the Constitution." *Stinson v. United Sta es*, 508 U.S. 36, 38, 45 (1993).

Nor is there any question that the vagueness doctrine applies broadly. It is not limited to criminal statutes prohibiting conduct or prescribing penalties. *See, e.g., Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966) (declaring void for vagueness a statute permitting juries to impose court costs on acquitted defendants). In fact, it is not limited to statutes at all. *See, e.g., Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-51 (1991) (judicial rule regulating the Bar); *Grayned v. City of Rockford*, 408 U.S. 104, 108-14 (1972) (local ordinance). For example, this Court has invalidated agency regulations on vagueness grounds. *See, e.g., FCC v. Fox Television Stations, Inc.*, 567 U.S. ___, 132 S. Ct. 2307, 2317-20 (2012) ("Th[e] requirement of clarity in regulation is essential to the protections provided by the Due Process Clause."). This latter precedent is particularly instructive here, because the "[G]uidelines are the equivalent of legislative rules adopted by federal

agencies." *Stinson*, 508 U.S. at 45. Because agency regulations can be unconstitutionally vague, the same must be true of the Guidelines, their "equivalent." *See id.* In sum, there is no legal basis to conclude that the Guidelines are somehow immune from vagueness challenges.

That the advisory Guidelines are subject to the Constitution is confirmed by *Peugh*'s holding that the retrospective use of a harsher version of the advisory Guidelines "create[d] a sufficient risk of a higher sentence to constitute an ex post facto violation." 133 S. Ct. at 2084. That holding rested on the fact that, although the Guidelines were rendered advisory in *Booker*, the federal system adopted certain measures "intended to make the Guidelines the lodestone of sentencing." *Id.* Those measures "aim[] to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review." *Id.* at 2083.

As *Peugh* stated, those measures are so powerful that "*the Guidelines are in a real sense the basis for the sentence*," even when a court varies outside the prescribed sentencing range. *Id.* (emphasis in original; internal quotation marks omitted). As a result, *Booker* did "not deprive the Guidelines of force as the framework for sentencing." *Id.* The Court thus rejected the government's "principal argument" that there could be no constitutional violation because the advisory Guidelines were merely "guideposts" and "lack[ed] sufficient legal effect to attain the status of a 'law' within the

meaning of the Ex Post Facto Clause." *Id.* at 2085-87. *See also Molina-Martinez v. United States*, 578 U.S. ___, 136 S. Ct. 1338, 1345-47, 1349 (2016) (reaffirming that the Guidelines serve as the "anchor," "focal point," and "lodestar" of sentencing, establish the "essential framework" of the proceeding, and have a "real and pervasive effect" on sentences).

Given the Guidelines's centrality to sentencing, they cannot be immune from the requirements of due process, "perhaps the most fundamental concept in our law." *Argersinger v. Hamlin*, 407 U.S. 25, 49 (1972). District courts are required to properly calculate the guideline range and "remain cognizant of [the Guidelines] throughout the sentencing process." *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007); *see* 18 U.S.C. § 3553(a)(4)(A). Requiring courts to use a vague residual clause necessarily violates due process "because no court could reliably ascertain the correct calculation of the Guidelines range." *Clayton*, ___ F.3d at ___, 2016 WL 3878156, at *12 (Rosenbaum, J., concurring). Indeed, the very ex post facto violation recognized in *Peugh* is premised on the Guidelines being intelligible. If the Guidelines could be vague consonant with the Constitution, then it simply would not matter which version of the Guidelines manual the sentencing court used. It would make scant sense to insulate the Guidelines from the Constitution's fundamental prohibition on vagueness, but not its prohibition on ex post facto laws.

That is particularly true given that this Court has repeatedly analyzed and cited these companion doctrines together.[6] The Court has recognized as "undoubtedly correct" that the Ex Post Facto and Due Process Clauses "safeguard common interests – in particular, the interests in fundamental fairness (through notice and fair warning) and the prevention of the arbitrary and vindictive use of the laws." *Rogers v. Tennessee*, 532 U.S. 451, 460 (2001); *compare Johnson*, 135 S. Ct. at 2556 (vagueness doctrine designed to ensure "fair notice" and prevent "arbitrary enforcement"); *with Weaver v. Graham*, 450 U.S. 24, 28-29 (1981) (ex post facto doctrine designed to "give fair warning" of legislative acts and prevent "arbitrary and potentially vindictive legislation"). In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), for example, the Court explained that judicial construction of a vague statute violated

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[6] *See, e.g.*, *United States v. Lanier*, 520 U.S. 259, 266 (1997) (referring to both vagueness and ex post facto doctrines as "related manifestations of the fair warning requirement"); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 & n.22 (1996) (citing ex post facto and due process authorities to support proposition that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice of the severity of the penalty that a State may impose"); *Gilmore v. Taylor*, 508 U.S. 333, 358 (1993) (citing both due process and ex post facto authorities to support proposition that "the Constitution requires a State to provide notice to its citizens of conduct will subject them to criminal penalties and what those penalties are"); *Marks v. United States*, 430 U.S. 188, 191-92 (1977) (fundamental "right to fair warning of that conduct which will give rise to criminal penalties" underlies both the Ex Post Facto and Due Process Clauses).

the Due Process Clause for the same reasons that retroactive legislation violated the Ex Post Facto Clause. *Id.* at 351-55, 362.

The dual concerns of fair notice and arbitrary enforcement underlying both Clauses apply here no less than they did in *Johnson*. Just like the ACCA's residual clause, § 4B1.2(a)(2)'s residual clause is a "judicial morass that defies systemic solution, a black hole of confusion and uncertainty that frustrates any effort to impart some sense of order and direction." *Johnson*, 135 S. Ct. at 2562 (internal quotation marks omitted). This "standardless" and "shapeless" provision of "hopeless indeterminacy" does not afford fair notice. *Id.* at 2556, 2558, 2560.

Section 4B1.2(a)(2)'s residual clause also "invites arbitrary enforcement." *Id.* at 2556. *Johnson* expressed concern that this Court's "[d]ecisions under the residual clause ha[d] proved to be anything but even-handed, predictable, or consistent." *Id.* at 2563. But it is those very same decisions that the lower courts have relied upon to interpret the residual clause in § 4B1.2(a)(2). Now that *Johnson* has abrogated those prior decisions, there is no longer any body of law for lower courts to consult when interpreting § 4B1.2(a)(2)'s residual clause. As a result, determining whether an offense constitutes a "crime of violence" under that clause could not be based on anything more than "guesswork and intuition." *Johnson*, 135 S. Ct. at 2560. The lower courts "will simply throw the [Court's residual-clause] opinions into the air in frustration,

and give free rein to their own feelings as to what offenses should be considered crimes of violence." *Derby v. United States*, 564 U.S. 1047, 131 S. Ct. 2858, 2859 (2011) (Scalia, J., dissenting from denial of certiorari). The residual clause in § 4B1.2(a)(2) would take on whatever fickle meaning judges gave it. The Due Process Clause's prohibition on vagueness was designed to safeguard against such arbitrary "personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575 (1974).

C. The Clear Majority View Is That *Johnson* Invalidates § 4B1.2(a)(2)'s Residual Clause

In light of the foregoing arguments, it is unsurprising that the majority view is that § 4B1.2(a)(2)'s residual clause is void for vagueness. The government has unequivocally conceded that point in this Court, as it has in the courts of appeals. BIO 15-16. And, with the lone exception of the court below, all eleven of the other courts of appeals have, at some point, either held or assumed that *Johnson* makes the identical language in § 4B1.2(a)(2) unlawful.[7]

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[7] *See, e.g.*, *United States v. Soto-Rivera*, 811 F.3d 53, 59 (1st Cir. 2016); *United States v. Welch*, 641 F. App'x 37, 43 (2d Cir. 2016) (per curiam); *Calabretta*, ___ F.3d at ___, 2016 WL 3997215, at *4; *United States v. Frazier*, 621 F. App'x 166, 168 (4th Cir. 2015) (per curiam); *United States v. Estrada*, No. 15-40264 (5th Cir. Oct. 27, 2015); *United States v. Pawlak*, 822 F.3d 902, 911 (6th Cir. 2016); *Ramirez v. United States*, 799 F.3d 845, 856 (7th Cir. 2015); *United States v. Taylor*, 803 F.3d 931, 932-33 (8th Cir. 2015) (per curiam); *United States v. Benavides*, 617 F. App'x 790, 790 (9th Cir. 2015)

The courts that have so held have arrived at this conclusion with little difficulty. For example, embracing many of the arguments made above, a unanimous panel of the Sixth Circuit found that this conclusion was so clear that it abrogated prior circuit precedent precluding vagueness challenges to the Guidelines. *See Pawlak*, 822 F.3d at 903, 911. That court found "no legal basis for concluding that the Guidelines are uniquely immune to vagueness challenges," *id.* at 907, and it considered undisputed "that the identical language of the Guidelines' residual clause implicates the same constitutional concerns as the ACCA's residual clause," *id.* at 911. It concluded that this Court's precedent "compels our holding that the rationale of *Johnson* applies equally to the residual clause of the Guidelines." *Id.* at 911.

A unanimous panel of the Tenth Circuit likewise found this conclusion so obvious that it satisfied plain error review. *Madrid*, 805 F.3d at 1210-13. It explained that, given its previous "reliance on the ACCA for guidance in interpreting § 4B1.2, it stretches credulity to say that we could apply the residual clause of the Guidelines in a way that is constitutional, when courts cannot do so in the context of the ACCA." *Id.* at 1211. The court emphasized that "[t]he concerns about judicial inconsistency that motivated the Court in *Johnson* lead us to conclude that the residual clause of the Guidelines is also unconstitutionally vague." *Id.* at

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(per curiam); *Madrid*, 805 F.3d at 1210; *In re Booker*, No. 16-3018 (D.C. Cir. June 10, 2016).

1210. A recent panel of the Third Circuit similarly concluded that *Johnson*'s invalidation of § 4B1.2(a)(2)'s residual clause satisfied plain error review. *Calabretta*, ___ F.3d at ___, 2016 WL 3997215, at *7.

In its post-*Johnson* decision below, however, the Eleventh Circuit concluded, without elaboration, that "*Johnson* says and decides nothing about career-offender enhancements under the Sentencing Guidelines." JA 163. That erroneous statement follows directly from (and was issued only eight days after) the Eleventh Circuit's anomalous decision in *United States v. Matchett*, 802 F.3d 1185 (11th Cir. 2015), which rejected the government's national concession and held that the vagueness doctrine does not apply to the advisory Guidelines. *Id.* at 1193-96.

Matchett was the first circuit court decision to address whether *Johnson* invalidated § 4B1.2(a)(2)'s residual clause. Revealingly, however, no other circuit has embraced that decision, and several have criticized it for, *inter alia*: relying exclusively on decisions predating *Johnson* and *Peugh*; disregarding entirely the prospect of arbitrary judicial enforcement with which *Johnson* was concerned; embracing reasoning that would permit the Commission to promulgate with constitutional impunity Guidelines that were facially discriminatory or irrational; and dismissing *Peugh* as irrelevant to its analysis. *See, e.g.*, *Calabretta*, ___ F.3d at ___, 2016 WL 3997215 at *6 & n.8; *Pawlak*, 822 F.3d at 908-11; *Madrid*, 805 F.3d at 1212 n.10. These persuasive criticisms have also come from within the Eleventh Circuit itself. *See, e.g.*, *Clayton*, ___ F.3d at

___, 2016 WL 3878156, at *3-7 (Martin, J., concurring in result); *id.*, ___ F.3d at ___, 2016 WL 3878156, at *10-13 (Rosenbaum, J., concurring); *id.*, ___ F.3d at ___, 2016 WL 3878156, at *16 (Jill Pryor, J., concurring in result); *In re Hunt*, ___ F.3d ___, 2016 WL 3895246, at *2-4 (11th Cir. July 18, 2016) (No. 16-14756) (Wilson, J., concurring).

In addition to its flawed legal analysis, the *Matchett* court also expressed concern that "holding the advisory guidelines can be unconstitutionally vague would invite more, not less, instability." 802 F.3d at 1196. But the court of appeals had it exactly backwards. Immunizing a vague guideline – particularly one as impactful as the career offender guideline – would infect every stage of the criminal-justice process. Uncertainty about its applicability would restrict defense counsel's ability to provide constitutionally adequate advice, paralyze the plea-bargaining process, confound probation officers and sentencing courts, and subject every career offender sentence to possible reversal for unreasonableness. The result would be chaos.

It would also guarantee unwarranted sentencing disparities, contrary to Congress's express intent. *See* 18 U.S.C. § 3553(a)(6). Indeed, because § 4B1.2(a)(2)'s residual clause would take on whatever meaning courts attributed to it on a given day, one defendant could be sentenced as a career offender, while another defendant with the exact same criminal history might not. In light of the inequities that would result from a vague career offender guideline, it is unsurprising that

the Sentencing Commission itself chose to delete § 4B1.2(a)(2)'s residual clause following *Johnson*. *See* U.S.S.G. § 4B1.2 (eff. Aug. 1, 2016). In short, the Sentencing Guidelines must be intelligible to fulfill their intended role as providing the uniform baseline for sentencing. If they are not, then calculating the guideline range would no longer be the linchpin of the federal sentencing regime; it would be a charade.

* * *

In sum, no basis in logic or law supports immunizing the Guidelines from the Constitution's fundamental prohibition on vagueness. Any legal provision "that flouts [this prohibition] 'violates the first essential of due process.'" *Johnson*, 135 S. Ct. at 2557 (quoting *Connally*, 269 U.S. at 391). In light of *Johnson*, this Court should declare the residual clause in § 4B1.2(a)(2) void for vagueness in violation of the Due Process Clause. And with that declaration, Mr. Beckles's challenge to his career offender sentence would sound in due process, rendering it cognizable on collateral review. *See* 28 U.S.C. § 2255(a); *Davis v. United States*, 417 U.S. 333, 342-43 (1974).

II. *JOHNSON* HAS RETROACTIVE EFFECT IN THIS CASE

In *Teague v. Lane*, 489 U.S. 288 (1989), and subsequent cases, the Court has "laid out the framework to be used in determining whether a rule announced in one of [its] opinions should be applied retroactively to judgments in criminal cases that are already final on

direct review." *Whorton v. Bockting*, 549 U.S. 406, 416 (2007). "The *Teague* inquiry is conducted in three steps." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997).

> First, the court must determine when the defendant's conviction became final. Second, it must ascertain the legal landscape as it then existed, and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule. That is, the court must decide whether the rule is . 'new.' Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity.

Beard v. Banks, 542 U.S. 406, 411 (2004) (internal quotation marks and citations omitted). The first exception to nonretroactivity is for "substantive" rules; the second for "watershed procedural" rules. *Welch v. United States*, 578 U.S. at ___, 136 S. Ct. 1257, 1264 (2016).[8]

Applying *Teague*'s three-step inquiry here is a straightforward task:

First, Mr. Beckles's conviction became final in 2009 when this Court denied his petition for a writ of certiorari seeking review of the Eleventh Circuit's affirmance of his conviction and sentence. *Beckles v.*

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[8] "Although *Teague* describes new substantive rules as an exception to the bar on retroactive application of procedural rules, this Court has recognized that substantive rules 'are more accurately characterized as . not subject to the bar.'" *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 728 (2016) (quoting *Schriro v. Summerlin*, 542 U.S. 352 n.4 (2004)).

United States, 558 U.S. 906 (2009) (Mem.); *see Clay v. United States*, 537 U.S. 522, 527 (2003) ("Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires.").

Second, there can be no dispute, and Mr. Beckles concedes, that *Johnson* announced a "new" rule as to him. This is so because, at the time Mr. Beckles's conviction became final in 2009, this Court's precedent in *James* foreclosed a vagueness challenge to the residual clause. *See* 550 U.S. at 210 n.6. *Johnson* expressly overruled that precedent. 135 S. Ct. at 2563; *see Welch*, 136 S. Ct. at 1264 ("It is undisputed that *Johnson* announced a new rule."); *Saffle v. Parks*, 494 U.S. 484, 488 (1990) ("The explicit overruling of an earlier holding no doubt creates a new rule.").

Third, this Court squarely held last Term that "*Johnson* announced a substantive rule that has retroactive effect in cases on collateral review." *Welch*, 136 S. Ct. at 1268. That ends the retroactivity analysis here. *Johnson* has retroactive effect in this collateral case.

Any conclusion to the contrary would represent a radical departure from this Court's categorical approach to retroactivity. As the Court has explained, new substantive rules "must be applied in all future trials, all cases pending on direct review, and *all* federal habeas corpus proceedings." *Danforth v. Minnesota*, 552 U.S. 264, 266 (2008) (emphasis added). Not

some proceedings; all proceedings. Since *Teague*, this Court has never given a new rule retroactive effect to only some cases on collateral review but not others.

A categorical approach to retroactivity accords with one of *Teague*'s main objectives: to eliminate the inequities that resulted from the previous retroactivity regime established in *Linkletter v. Walker*, 381 U.S. 618 (1965). In *Linkletter*, the Court "adopt[ed] a practical approach" to retroactivity and held that "the retroactive effect of each new rule should be determined on a case-by-case basis by examining the purpose of the rule, the reliance on the prior law, and the effect on the administration of justice of the retroactive application of the rule." *Danforth*, 552 U.S. at 273 (citing *Linkletter*, 381 U.S. at 629). That approach "produced strikingly divergent results." *Id.*

In *Griffith v. Kentucky*, 479 U.S. 314 (1987), the Court abandoned *Linkletter* as it applied to cases still on direct review as "unprincipled and inequitable." *Id.* at 274. *Griffith* held that a new rule of law "is to be applied retroactively to *all* cases, state or federal, pending on direct review or not yet final." 479 U.S. at 328 (emphasis added). The "integrity of judicial review" required that result for two reasons. *Id.* at 323. First, failing to do so would amount to a legislative activity "violat[ing] basic norms of constitutional adjudication." *Id.* at 322. Second, the "selective application of new rules violates the principle of treating similarly situated defendants the same." *Id.* at 323. Because the Court "cannot hear each case pending on direct review

and apply the new rule," it "fulfill[s] [its] judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final." *Id.* Thus, a rule announced in a decision of this Court may not be given retroactive effect only to some cases on direct review; rather, it must be given such effect to *all* cases at that stage of the criminal justice process. *Id.* at 328.

Two years later, *Teague* applied *Griffith*'s reasoning in the context of collateral review. *See Teague*, 489 U.S. at 303-10. That opinion observed that, not only had *Linkletter* "led to the disparate treatment of similarly situated defendants on direct review," *id.* at 303, but it "also led to unfortunate disparity in the treatment of similarly situated defendants on collateral review," *id.* at 305. As a result, *Teague* declined to recognize a new, nonretroactive rule in that particular collateral case, because doing so would "give petitioner the benefit of that new rule even though it would not be applied retroactively to others similarly situated." *Id.* at 315. The Court emphasized that "the harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment hardly comports with the ideal of administration of justice with an even hand." *Id.* (internal quotation marks omitted). *Teague* "therefore h[e]ld that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of

the two exceptions we have articulated." *Id.* at 316 (emphasis in original). Thus, just as *Griffith* held that new rules have retroactive effect in *all* cases on direct review, *Teague* held that new substantive rules have retroactive effect in *all* cases on collateral review.

The upshot is a categorical, rule-based approach to retroactivity. As the Court has explained, its post-*Teague* "retroactivity jurisprudence is concerned with whether, as a categorical matter, a new rule is available as a *potential* ground for relief." *Davis v. United States*, 564 U.S. 229, 243 (2011) (emphasis in original). In other words, "[r]etroactive application . lifts what would otherwise be a categorical bar to obtaining redress for the violation of a newly announced constitutional rule," such that a defendant "may invoke [the] newly announced rule as a basis for seeking relief." *Id.* at 243-44. This categorical analysis therefore turns on the rule itself; it does not depend on the particular context in which the rule is invoked.

Accordingly, this Court has carefully kept the retroactivity of a rule analytically distinct from other issues that may affect a claim based on that rule. For example, the retroactivity of a rule is unaffected by whether: the petitioner's claim "falls within the scope" of the rule announced by the Court, *O'Dell*, 521 U.S. at 159; the rule "could support any claim for relief in petitioner's case," *Sawyer v. Smith*, 497 U.S. 227, 233-34 (1990); the petitioner's claim is procedurally barred, *Bousley v. United States*, 523 U.S. 614, 621 (1998); or the rule will ultimately afford the petitioner a remedy, *Davis*, 564 U.S. at 243-44; *Powell v. Nevada*, 511 U.S.

79, 84 (1994). In short, the retroactivity of the rule is distinct from whether a petitioner will ultimately benefit from it. While there are numerous reasons why a petitioner may not benefit from a newly-announced substantive rule, nonretroactivity is not one of them.

Given the clarity of this Court's categorical approach to retroactivity, it is unsurprising yet significant that Congress codified that approach in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. There, Congress instructed the courts of appeals to authorize a second or successive petition where, *inter alia*, "the claim relies on a new rule of constitutional law, made retroactive to *cases on collateral review* by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A) (emphasis added); *accord* 28 U.S.C. § 2255(h)(2). And it used the exact same categorical language in circumscribing the availability of evidentiary hearings. *See* 28 U.S.C. § 2254(e)(2)(A). This language reflects Congress's post-*Teague* understanding that, when this Court makes a new rule retroactive, it necessarily does so for *all* cases on collateral review. Were this Court to hold otherwise, these key statutory provisions would be rendered inoperable.

It is therefore also unsurprising that the government, in addition to Congress, once embraced this understanding of retroactivity. In the years before *Johnson*, the government advanced the very same position that Mr. Beckles advances here, and in this very same context. Following the Court's residual-clause-narrowing decisions in *Begay* and *Chambers v. United*

States, 555 U.S. 122 (2009), the government conceded in litigation around the country that those decisions had retroactive effect not only in ACCA cases, but in Guidelines cases as well. *See, e.g.*, *United States v. Doe*, 810 F.3d 132, 154 (3d Cir. 2015); *Narvaez v. United States*, 674 F.3d 621, 623, 625-26 (7th Cir. 2011).

The government did not merely concede that point but vigorously advanced it. Slightly over two years ago, the government's major argument heading in an en banc brief before the Eleventh Circuit was this: "*Begay* Applies Retroactively to ACCA Cases, Mandatory Guidelines Cases, and Advisory Guideline Cases Alike." Supplemental Brief for the United States on Rehearing En Banc at 48, *Spencer v. United States*, 773 F.3d 1132 (11th Cir. May 21, 2014) (No. 10-10676). There was no qualification. In a sub-heading, the government affirmatively argued: "*Begay*'s Status as a Substantive Rule Does Not Vary Based on the Nature of the Claim." *Id.* at 54. The government criticized as "questionable" the notion that "a rule's status as substantive or procedural varies based on the context in which the claim is asserted." *Id.* at 56. It specifically stated that it was "not aware of any such chameleon-like rules" that "were substantive for some purposes and procedural for others." *Id.* Rather, it opined that "[t]he better view is that a rule either is or is not substantive, and that its status as such does not involve a context-dependent assessment into how the rule is being invoked." *Id.* Well said.

Rather than re-affirm that uncontroversial position after *Johnson* – a case that not only narrowed but

invalidated the ACCA's residual clause – the government curiously argued in *Welch* that *Johnson* was not retroactive in the context of the Guidelines. *See* Brief for the United States at 38 n.9, *Welch*, 136 S. Ct. 1257 (2016) (No. 15-6418), 2016 WL 537542; Reply Brief for the United States at 8-9 & n.3, *Welch*, 2016 WL 1165972. Yet, notwithstanding those arguments, the Court repeatedly held, without qualification, that *Johnson* "has retroactive effect in *cases on collateral review*." *Welch*, 136 S. Ct. at 1268 (emphasis added); *see id.* at 1265 (same); *id.* at 1268 (same, reiterating holding). The Court also repeatedly framed the question in that same categorical manner. *Id.* at 1261, 1263-64. At no time did *Welch* suggest that *Johnson* (or any other rule) could have retroactive effect only in some, but not all, cases on collateral review. To the contrary, the Court's language in *Welch* fully comports with, and is mandated by, its categorical approach to retroactivity after *Teague*.[9] Because the rule in *Johnson* has retroactive effect in *all* cases on collateral review, it clearly has retroactive effect in this one.

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[9] Several lower courts have recently been even more explicit about this. *See, e.g.*, *In re Sapp*, ___ F.3d ___, 2016 WL 3648334, at *5 (11th Cir. July 7, 2016) (No. 16-13338) (Jordan, Rosenbaum, and Jill Pryor, JJ., concurring) ("For purposes of collateral review in criminal cases, constitutional retroactivity is an all-or-nothing proposition. A new substantive rule of constitutional law is either retroactive on collateral review or it is not.") (internal citations omitted); *In re Hubbard*, ___ F.3d ___, 2016 WL 3181417, at *6 (4th Cir. June 8, 2016) (No. 15-276) ("*Welch* declared unequivocally that *Johnson* was 'a substantive decision and so has retroactive effect under *Teague* in cases on collateral review,' and the government has cited no case to support the proposition that a

That conclusion is particularly compelling here because, as explained above in Part I, § 4B1.2(a)(2)'s residual clause suffers from the exact same constitutional infirmities that rendered the ACCA's residual clause void for vagueness. It would be highly incongruous for this Court to conclude that: (1) the ACCA's residual clause is unconstitutionally vague (*Johnson*); (2) *Johnson* renders § 4B1.2(a)(2)'s residual clause unconstitutionally vague for the same reasons (Part I, *supra*); (3) *Johnson* has retroactive effect in "cases on collateral review" (*Welch*); but (4) *Johnson* does *not* have retroactive effect in Guidelines cases on collateral review. If the first three propositions are true, then the fourth follows *a fortiori*. Indeed, it would be an anomaly to say that the rule in *Johnson* does not have retroactive effect in collateral Guidelines cases even though it both is substantive and invalidates § 4B1.2(a)(2)'s residual clause.

Although this Court's categorical approach to retroactivity requires it, that common-sense conclusion is bolstered by this Court's retroactivity analysis in *Welch*. There, the Court reaffirmed that "'[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law

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rule can be substantive in one context but procedural in another.") (internal citation omitted); *Doe*, 810 F.3d at 154 n.13 (3d Cir. 2015) ("Under *Teague*, either a rule is retroactive or it is not."); *Price v. United States*, 795 F.3d 731, 732, 734 (7th Cir. 2015) (stating that "*Teague* recognized that new substantive rules are categorically retroactive" and holding, even before *Welch*, that *Johnson* was "categorically retroactive to cases on collateral review").

punishes.'" *Welch*, 136 S. Ct. at 1264-65 (quoting *Summerlin*, 542 U.S. at 353). Although the Court recognized other formulations, it referred to this one as the "normal criteria for a substantive rule," *id.* at 1267, invoking it six times in only four short pages, *see id.* at 1264-68. In so doing, the Court clarified that "whether a new rule is substantive or procedural" is determined "by considering the function of the rule." *Id.* at 1265. And a rule has a "substantive function" where it "alters the range of conduct or class of persons that the law punishes." *Id.* at 1266. The Court concluded that, "[u]nder this framework, the rule announced in *Johnson* is substantive." *Id.* at 1265.

The Court explained: "By striking down the residual clause as void for vagueness, *Johnson* changed the substantive reach of the Armed Career Criminal Act, altering the range of conduct or the class of persons that the Act punishes." *Id.* (citation omitted). "Before *Johnson*, the Act applied to any person who possessed a firearm after three violent felony convictions, even if one or more of those convictions fell under only the residual clause." *Id.* However, after *Johnson*, the very "same person engaged in the same conduct is no longer subject to the Act." *Id.*

"By the same logic," the Court continued, "*Johnson* is not a procedural decision," because it "had nothing to do with the range of permissible methods a court might use to determine whether a defendant should be sentenced under the Armed Career Criminal Act." *Id.* It did not, for example, "allocate decisionmaking

authority between judge and jury, or regulate the evidence that the court could consider in making its decision." *Id.* (quotation marks and internal citation omitted). Rather, "*Johnson* affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied." *Id. Johnson* therefore had the substantive function of altering the range of conduct and class of persons that the legal provision punished. *See id.*

That exact same substantive function exists here. By invalidating § 4B1.2(a)(2)'s residual clause, "*Johnson* changed the substantive reach of the [career offender guideline], altering the range of conduct or the class of persons that the [guideline] punishes." *Welch*, 136 S. Ct. at 1265 (internal quotation marks omitted). Before *Johnson*, the career offender guideline applied to any person who was convicted of a crime of violence after two prior convictions for a crime of violence, "even if one or more of those convictions fell under only the residual clause." *Id.* But after *Johnson*, "some crimes will no longer fit the Sentencing Guidelines' definition of a crime of violence and will therefore be incapable of resulting in a career-offender sentencing enhancement." *Hubbard*, ___ F.3d at ___, 2016 WL 3181417 at *7. Thus, the very same person who qualified as a career offender based on § 4B1.2(a)(2)'s residual clause before *Johnson* "is no longer subject to" the career offender enhancement after *Johnson*. *Welch*, 136 S. Ct. at 1265.

And just as *Johnson*'s invalidation of the ACCA's residual clause is not procedural, neither is its invalidation of § 4B1.2(a)(2)'s residual clause. It does not "allocate decisionmaking authority" between judge and jury, "regulate the evidence that the court could consider," or "alter the permissible methods for determining whether a defendant's conduct is punishable." *Id.* (citations omitted). This Court's decisions in *Shepard v. United States*, 544 U.S. 13 (2005) (limiting prior-conviction documents that sentencing courts may consult), *Descamps v. United States*, 570 U.S. ___, 133 S. Ct. 2276 (2013) (prohibiting sentencing courts from consulting *Shepard* documents where statute of conviction is "indivisible"), and *Mathis v. United States*, 579 U.S. ___, 136 S. Ct. 2243 (2016) (holding that statute is indivisible where it contains alternative "means" of satisfying an element), are all examples of procedural rules in this context. They instruct courts how to apply the categorical approach – the methodology used to determine whether a prior conviction qualifies as a "violent felony" under the ACCA or "crime of violence" under § 4B1.2(a).

By contrast, *Johnson* "affected the reach of the [career offender guideline] rather than the judicial procedures by which [it] is applied." *Welch*, 136 S. Ct. at 1265. It narrowed the substantive definition of the term "crime of violence" and, in turn, the reach of the enhancement. Indeed, *Johnson* narrowed eligibility for the career offender enhancement just as much as it narrowed eligibility for the ACCA enhancement. And,

as was true in ACCA cases, no procedures can be afforded to render the career offender enhancement applicable if that enhancement is based on the residual clause. It is for precisely that reason that the government had previously conceded that this Court's ACCA-narrowing decisions had retroactive effect in Guidelines cases.[10] In short, *Johnson*'s invalidation of § 4B1.2(a)(2)'s residual clause "'alters the range of conduct or the class of persons that the law punishes.'" *Welch*, 136 S. Ct. at 1264-65 (quoting *Summerlin*, 542 U.S. at 353). That is, it changed "the actual content" of § 4B1.2(a)(2). *Summerlin*, 542 U.S. at 355 n.5.

* * *

In sum, this Court's three-step analysis neatly resolves any retroactivity issue here. Mr. Beckles's conviction became final in 2009; this Court in *Johnson* announced a "new" rule in 2015; and *Welch* held that *Johnson* announced a "substantive" rule that has retroactive effect in "cases on collateral review." *Welch*, 136 S. Ct. at 1268. This Court's retroactivity precedents make clear that, like any other new substantive

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[10] *See, e.g.*, Supplemental Brief for the United States on Rehearing En Banc at 53, *Spencer v. United States*, 773 F.3d 1132 (No. 10-10676) ("*Begay* narrowed the reach of the ACCA's residual clause – and by logical extension, the career-offender guideline's residual clause. . *Begay* thus narrowed the class of persons who are eligible to receive a recidivist sentencing enhancement, and no procedures permit a non-*Begay*-qualifying conviction from being treated as a [qualifying predicate]."); *id.* at 55 ("*Begay* narrows eligibility for the advisory career-offender enhancement just as much as it narrowed eligibility for the enhancements in [ACCA] cases. And, as was true in those cases, no procedures can be afforded to render that enhancement applicable.").

rule, *Johnson* must have retroactive effect in *all* cases on collateral review. That conclusion is particularly clear in this case, because *Johnson* renders § 4B1.2(a)(2)'s residual clause unconstitutionally vague for the same reasons as the ACCA's residual clause. And this Court's reasoning in *Welch* applies equally here. Accordingly, *Johnson* has retroactive effect in this collateral case.

III. AFTER *JOHNSON*, PETITIONER'S CONVICTION FOR UNLAWFUL POSSESSION OF A SAWED-OFF SHOTGUN IS NOT A "CRIME OF VIOLENCE"

At the time Mr. Beckles was sentenced, the commentary to U.S.S.G. § 4B1.2 specified that his offense – unlawful possession of a sawed-off shotgun – was a "crime of violence" for purposes of that guideline. § 4B1.2 cmt. n.1 (2006). As relevant here, the commentary provided: "[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (*e.g.*, a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence.'" *Id.* The court below determined that *Johnson* had no effect on Mr. Beckles's career offender designation because this commentary provided an independent basis for justifying the career offender enhancement. *See* JA 163. It stated: "Beckles was sentenced as a career offender based *not* on the ACCA's residual clause, but based on express language in the Sentencing Guidelines classifying Beckles's offense as a 'crime of violence.' *Johnson* says and decided nothing about the commentary underlying Beckles's status

as a career-offender." *Id.* (emphasis in original). But the Eleventh Circuit's conclusion collapses on its foundation once the residual clause is invalidated. Without the residual clause's definition of "crime of violence," the commentary on which the court of appeals relied becomes inconsistent with the text of § 4B1.2. The commentary therefore cannot be used to support Mr. Beckles's career offender enhancement.

Stinson sets forth the relationship between the Sentencing Guidelines and their commentary: "The functional purpose of commentary . is to assist in the interpretation and application of those rules, which are within the Commission's particular area of concern and expertise and which the Commission itself has the first responsibility to formulate and announce." *Stinson*, 508 U.S. at 45. Thus, *Stinson* explained, the Guidelines are "the equivalent of legislative rules adopted by federal agencies," and the commentary is "akin to an agency's interpretation of its own legislative rules." *Id.* at 45. Applying the analogous administrative-law standard, the Court held that commentary interpreting or explaining a guideline is "authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38. If the "commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline." *Id.* at 43. The text of the guideline must therefore "bear the construction" the commentary lends it. *Id.* at 46. In short, the commentary has

no freestanding definitional power; it may only interpret or explain a guideline's text.

Particularly instructive here is the First Circuit's recent decision in *United States v. Soto-Rivera*, 811 F.3d 53 (1st Cir. 2016). There, the defendant was convicted of possession of a machine gun, which, like a sawed-off shotgun, is a "firearm" described in 26 U.S.C. § 5845(a), and its possession is therefore listed as a "crime of violence" in the commentary to § 4B1.2. *See* § 4B1.2 cmt. n.1. The *Soto-Rivera* court proceeded on the government's concession that *Johnson* invalidated § 4B1.2(a)(2)'s residual clause. *Id.* at 58, 61 & nn.10, 12. The government also acknowledged, and the court agreed, that possession of a machine gun: (1) did not qualify under the "elements clause" of § 4B1.2(a)(1) because it did not have as an element the use, attempted use, or threatened use of force; and (2) was not one of the offenses enumerated in the text of § 4B1.2(a)(2). *Id.* at 58, 60. With those provisions and "the residual clause out of the picture," the government relied exclusively on the commentary to § 4B1.2 to support classifying possession of a machine gun as a "crime of violence." *Id.* at 59. The court rejected that reliance as "hopeless." *Id.* at 60. It held that, absent the residual clause, "[t]here is simply no mechanism or textual hook in the Guideline that allows us to import offenses not specifically listed therein into § 4B1.2(a)'s definition of 'crime of violence.' With no such path available to us, doing so would be inconsistent with the text of the Guideline" under *Stinson*. *Id.* Accordingly, the court vacated the sentence. *Id.* at 61-62.

The same straight-forward application of *Stinson* applies here. As demonstrated in Part I above, § 4B1.2(a)(2)'s residual clause is void for vagueness in light of *Johnson*. Thus, that clause has effectively been excised from the text of § 4B1.2. Without the residual clause's broad definition of a "crime of violence," the commentary enumerating unlawful possession of a sawed-off shotgun as a "crime of violence" becomes inconsistent with the remaining text of the guideline, since that offense clearly does not fall within either of the remaining definitions. It does not have as an element "the use, attempted use, or threatened use of physical force against another." § 4B1.2(a)(1). Nor is it one of the offenses that was enumerated as a "crime of violence" in the text of § 4B1.2(a)(2) at the time of Mr. Beckles's sentencing. *See* 4B1.2(a)(2) (2006) (defining "crime of violence" as "any offense that – is burglary of a dwelling, arson, or extortion, [or] involves use of explosives"). Relying on the commentary therefore impermissibly "violat[es] the dictates" of the text of § 4B1.2 once the residual clause has been invalidated. *Stinson*, 508 U.S. at 43. Accordingly, under *Stinson*, the commentary may not be used to support the enhancement. *See United States v. Shell*, 789 F.3d 335, 340 (4th Cir. 2015) ("where commentary is inconsistent with [a guideline's] text, text controls"). And, without the commentary, Mr. Beckles's possession of a sawed-off shotgun no longer qualifies as a "crime of violence."

That conclusion is confirmed by the history of the commentary linking this particular offense to the residual clause. When the Sentencing Commission first

listed possession of a sawed-off shotgun as a "crime of violence" in the commentary, it explained that it did so in accordance with court decisions holding that the offense qualified as a "crime of violence" only under the residual clause. U.S.S.G. app. C, amend. 674 (Reason for Amendment) (2004) ("A number of courts have held that possession of certain of these firearms, such as a sawed-off shotgun, is a 'crime of violence' due to the serious potential risk of physical injury to another person."). At that time, "the Fourth, Seventh, Eighth, and Ninth Circuits each ha[d] found that, because it is primarily used for violent purposes, possession of a sawed-off shotgun presents a serious potential risk of physical injury and therefore constitutes a 'crime of violence.'" *United States v. Serna*, 309 F.3d 859, 863-64 (5th Cir. 2002) (collecting cases).

Pre-*Johnson* circuit court decisions also continued to link the commentary's designation of possession of a sawed-off shotgun as a "crime of violence" exclusively to § 4B1.2(a)(2)'s residual clause. *See United States v. Hood*, 628 F.3d 669, 671 (4th Cir. 2010) ("Because § 4B1.2(a) does not expressly enumerate felony possession of a sawed-off shotgun, it constitutes a 'crime of violence' only if it falls under the 'residual' or 'otherwise' clause in § 4B1.2(a)(2)."); *United States v. Lipscomb*, 619 F.3d 474, 477 (5th Cir. 2010) ("We think that the Sentencing Commission's commentary to § 4B1.2 answers" the question of whether possession of a sawed-off shotgun qualifies as a "crime of violence" under the residual clause); *United States v. Hawkins*,

554 F.3d 615, 617-18 (6th Cir. 2009) (holding that Commission's interpretation of the residual clause allowing possession of a sawed-off shotgun to qualify as a "crime of violence" was not clearly erroneous).

Finally, the Commission again recently confirmed that this aspect of the commentary was tethered exclusively to the residual clause. Upon deleting § 4B1.2(a)(2)'s residual clause for "many of the same concerns cited by the Supreme Court in *Johnson*," the Commission moved the unlawful possession of a sawed-off shotgun offense out of the commentary and into the text of the Guideline. *See* U.S.S.G. § 4B1.2 app. C, amend 798 (Reason for Amendment). In so doing, the Commission implicitly and correctly recognized that this "crime of violence" enumerated in the commentary depended entirely on the residual clause and could not stand on its own without it.

In conclusion, following *Johnson*'s invalidation of § 4B1.2(a)(2)'s residual clause, the commentary to that guideline specifying unlawful possession of a sawed-off shotgun as a "crime of violence" is inconsistent with that guideline's text and is therefore invalid. *See Stinson*, 508 U.S. at 38, 44. Accordingly, the court below erred by relying on that commentary to uphold Mr. Beckles's career offender enhancement.

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. V

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "[n]o person shall . be deprived of life, liberty, or property, without due process of law."

FEDERAL STATUTES

18 U.S.C. § 924(e)

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years,

(2) As used in this subsection–

* * *

(B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year that –

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise

involves conduct that presents a serious potential risk of physical injury to another; . .

* * *

26 U.S.C. § 5845(a)

(a) Firearm. – The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; .

28 U.S.C. § 994(h)

(h) The [United States Sentencing] Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and–

(1) has been convicted of a felony that is –

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is –

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

28 U.S.C. § 2255(a)

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

UNITED STATES SENTENCING GUIDELINES

U.S.S.G. § 4B1.1. Career Offender (2006)

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a

felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) [I]f the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

Offense Statutory Maximum	Offense Level[]
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than one year, but less than 5 years	12.

* * *

Commentary

Application Notes:

1. "Crime of violence" [is] defined in §4B1.2.

* * *

U.S.S.G. § 4B1.2. Definition of Terms Used in Section 4B1.1 (2006)

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

* * *

Commentary

Application Notes:

1. For purposes of this guideline –

* * *

"Crime of violence" does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a). Where the instant offense of conviction is the unlawful possession of a firearm by a felon, § 2K2.1 (Unlawful Receipt, Possession, or

Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant had one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), § 4B1.4 (Armed Career Criminal) will apply.

* * *

Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a "crime of violence."

* * *

RECORD AND BRIEFS

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No. 15-8544

In the Supreme Court of the United States

TRAVIS BECKLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

In *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), this Court held that the residual clause in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. In *Welch* v. *United States*, 136 S. Ct. 1257 (2016), the Court held that *Johnson* announced a new "substantive" rule of constitutional law that applies retroactively in an initial collateral challenge under 28 U.S.C. 2255 to a sentence enhanced under the ACCA. 136 S. Ct. at 1268. The questions presented are:

1. Whether a ruling that the residual clause of Section 4B1.2(a)(2) of the Sentencing Guidelines is void for vagueness would apply retroactively in a motion under Section 2255.

2. Whether the residual clause of Section 4B1.2(a)(2) of the Sentencing Guidelines is void for vagueness.

3. Whether, after *Johnson*, petitioner's conviction for being a felon in possession of a sawed-off shotgun qualifies as a "crime of violence" under the commentary to Section 4B1.2 of the Sentencing Guidelines, which expressly designates possession of a short-barreled shotgun as a crime of violence.

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In the Supreme Court of the United States

No. 15-8544

TRAVIS BECKLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 161-163) is not published in the Federal Reporter but is reprinted at 616 Fed. Appx. 415. A prior opinion of the court of appeals (J.A. 155-158) is not published in the Federal Reporter but is reprinted at 579 Fed. Appx. 833. The relevant orders of the district court (J.A. 127-152, 153-154) are not reported. The opinion of the court of appeals on direct review (J.A. 15-40) is reported at 565 F.3d 832.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 2015. A petition for rehearing was denied on February 11, 2016 (J.A. 164-165). The petition for a writ of certiorari was filed on March 9, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND SENTENCING GUIDELINES PROVISIONS INVOLVED

The relevant constitutional and Sentencing Guidelines provisions are reproduced in the appendix to this brief. See App., *infra*, 1a-12a.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed, J.A. 16, and this Court denied a petition for a writ of certiorari, 558 U.S. 906 (2009). The district court subsequently reduced petitioner's sentence to 216 months of imprisonment after the government filed a motion under Federal Rule of Criminal Procedure 35(b). J.A. 3 (Doc. 150).

Petitioner then filed a motion to vacate his sentence under 28 U.S.C. 2255(a). J.A. 41. The district court denied the motion but issued a certificate of appealability. J.A. 154. The court of appeals affirmed. J.A. 156. Petitioner filed a petition for a writ of certiorari, and this Court granted the petition, vacated the judgment, and remanded to the court of appeals for further consideration in light of *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). 135 S. Ct. 2928. On remand, the court of appeals again affirmed the denial of petitioner's Section 2255 motion. J.A. 162.

A. Legal Background

1. In the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, § 217(a), 98 Stat. 2017, Con-

gress created the United States Sentencing Commission and required the Commission to promulgate the federal Sentencing Guidelines. 28 U.S.C. 991(a), 994(a). Under the Guidelines, an offense of conviction receives a "base offense level," which may be adjusted up or down based on factors such as offense characteristics or the defendant's acceptance of responsibility. See Sentencing Guidelines Chs. 2 and 3. The defendant also receives a criminal-history category based on his prior convictions. See *id.* Ch. 4. The offense level coupled with the criminal-history category yields a sentencing range. See *id.* Ch. 5, Pt. A.

The Sentencing Reform Act contemplates that, in addition to guidelines and policy statements, the Commission will issue "official commentary" providing authoritative interpretations of Guidelines provisions or explaining how they apply in practice. 18 U.S.C. 3553(b); see *Stinson* v. *United States*, 508 U.S. 36, 41 (1993). Since first promulgating the Guidelines in 1987, the Commission has issued official commentary containing "application notes" and background information for individual Guidelines provisions. The Sentencing Guidelines have also always included a guideline stating that the commentary may "interpret [a] guideline or explain how it is to be applied" or "suggest circumstances which * * * may warrant departure from the guidelines." Sentencing Guidelines § 1B1.7; see *Stinson*, 508 U.S. at 41.

In *United States* v. *Booker*, 543 U.S. 220 (2005), this Court held that mandatory Sentencing Guidelines violate the Sixth Amendment by predicating higher sentences on judicial factfinding. *Id.* at 243-244. The Court remedied that problem by rendering the Guidelines advisory. *Id.* at 245. Under the advisory Guide-

lines, a district court must still "begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall* v. *United States*, 552 U.S. 38, 49-50 (2007). The district court, however, "may not presume that the Guidelines range is reasonable"; instead, the court "must make an individualized assessment based on the facts presented" in light of the sentencing factors set forth at 18 U.S.C. 3553(a). *Gall*, 552 U.S. at 49-50. An appellate court reviews the district court's sentencing decision to ensure both that the court did not make a "procedural error," such as miscalculating the advisory Guidelines range, and that the ultimate sentence does not reflect an abuse of discretion. *Id.* at 51.

2. The Sentencing Reform Act requires the Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for an adult defendant convicted of a "crime of violence" or a drug felony who had previously been convicted of two or more such offenses. 28 U.S.C. 994(h). The Sentencing Guidelines have accordingly always included a "career offender" guideline that specifies enhanced sentences for the category of defendants described in Section 994(h). See Sentencing Guidelines § 4B1.1. If a defendant is a career offender, he is assigned a criminal-history category of VI and his offense level may be increased, yielding a higher sentencing range. See *id.* § 4B1.1(b).

Section 4B1.2(a) of the Guidelines defines the term "crime of violence" for purposes of the career-offender guideline and several other guidelines. See, *e.g.*, Sentencing Guidelines § 2K1.3, comment. (n.2). The Sentencing Commission originally defined that term by

incorporating the U.S. Criminal Code's definition of "crime of violence" set out at 18 U.S.C. 16. Sentencing Guidelines § 4B1.2(1) (1987). That definition includes any offense with a specified "physical force" element as well as any felony "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 16. The Commission's 1987 official commentary "interpret[ed] this" to mean that certain offenses, such as murder, kidnapping, extortionate extension of credit, arson, and robbery, "are covered by this provision." Sentencing Guidelines § 4B1.2, comment. (n.1) (1987).

In 1989, the Commission replaced the original definition of "crime of violence" with language modeled on the definition of "violent felony" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B). The Commission's revised definition had a "physical force" elements clause that was similar to the one in the Section 16 definition, but its second clause differed. The second clause encompassed any offense punishable by more than one year of imprisonment that "is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Sentencing Guidelines App. C, Amend. 268 (Nov. 1, 1989). The Commission, however, also specified in the commentary that, in addition to the four enumerated offenses listed in the ACCA definition, the Guidelines' term "'[c]rime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling." *Ibid.*

The Commission has periodically amended the commentary to Section 4B1.2 to add or subtract covered offenses. In 1991, the Commission added a note stating that the term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon, see 18 U.S.C. 922(g)(1). Sentencing Guidelines App. C., Amend. 433 (Nov. 1, 1991). This Court held in *Stinson* that courts must treat that note as "a binding interpretation of the phrase 'crime of violence'" in the Guidelines because, although the note is not "compelled by the guideline text," it is not "plainly erroneous or inconsistent" with the text. 508 U.S. at 47 (citation omitted). The Commission later amended the note to specify that a felon-in-possession conviction does qualify as a crime of violence if the firearm that the felon possessed was covered by the National Firearms Act, see 26 U.S.C. 5845(a), which regulates such especially dangerous weapons as short-barreled shotguns and machineguns. Sentencing Guidelines App. C., Amend. 674 (Nov. 1, 2004).

3. As discussed above, the Commission's 1989 definition of "crime of violence" was modeled on the ACCA. The ACCA imposes a sentence of 15 years to life on any person who possesses a firearm in violation of 18 U.S.C. 922(g) and who has at least three prior convictions for a "violent felony" or a "serious drug offense," 18 U.S.C. 924(e)(1). Absent the ACCA enhancement, the maximum punishment for that offense is ten years of imprisonment. 18 U.S.C. 924(a)(2).

In *Johnson*, this Court held that the so-called "residual clause" of the ACCA's definition of "violent felony"—*i.e.*, "otherwise involves conduct that presents a serious potential risk of physical injury to another"—is void for vagueness. 135 S. Ct. at 2557

(citation omitted). The Court concluded that by requiring courts to assess the risk presented by an idealized "ordinary case" of an offense in light of the preceding disparate list of enumerated offenses, including by inquiring into whether violent conduct would likely occur after the completion of the offense, the residual clause was too "shapeless" to comport with the Due Process Clause. *Id.* at 2556-2663. In so holding, the Court overruled its two precedents holding that the residual clause was not vague. See *Sykes* v. *United States*, 564 U.S. 1, 15-16 (2011); *James* v. *United States*, 550 U.S. 192, 210 n.6 (2007).

In *Welch* v. *United States*, 136 S. Ct. 1257 (2016), this Court held that *Johnson*'s holding applies retroactively to prisoners seeking collateral relief for ACCA sentences. *Id.* at 1265. The Court explained that "[a]fter *Johnson*, the same person engaging in the same conduct is no longer subject to the [ACCA] and faces at most 10 years in prison." *Ibid.* Because "*Johnson* affected the reach of the underlying statute," the Court concluded that it was "a substantive decision" that, under this Court's retroactivity doctrine, applies retroactively on collateral review. *Ibid.*

4. Effective August 1, 2016, the Sentencing Commission amended the definition of "crime of violence" in Section 4B1.2(a) to eliminate its residual clause. Sentencing Guidelines App. C, Amend. 798 (Supp.). The current definition retains the elements clause, but the second clause now provides that a "crime of violence" includes "murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)."

Ibid. The Commission explained that it moved many offenses previously listed in the commentary into the main text "[f]or easier application." *Ibid.*

B. The Current Controversy

1. On April 11, 2007, Police Detective Diego Castro observed petitioner loitering in a public-housing facility. Petitioner saw Castro and fled. After a chase, Castro apprehended petitioner in the apartment of petitioner's girlfriend, Tiovanni Jones, where he sometimes lived. Jones said that a gun was in the bedroom and consented to a search of the apartment. After searching for the gun unsuccessfully, Castro asked petitioner where the gun was located. Petitioner said that a shotgun was under the mattress. Castro recovered a sawed-off Browning shotgun from under the mattress. Petitioner later admitted that he was a drug dealer and had acquired the shotgun for protection. J.A. 18-20; 07-15062 Gov't C.A. Br. 3-5; Presentence Investigation Report (PSR) ¶¶ 4-8.

2. a. A federal grand jury charged petitioner with possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1). J.A. 16. A jury convicted petitioner of that charge. J.A. 18.

b. Petitioner was sentenced in October 2007. J.A. 22. Petitioner's criminal history included at least three qualifying convictions for "serious drug offense[s]." See PSR ¶¶ 18, 24, 30, 33, 35, 38. Under the ACCA, therefore, his statutory sentencing range was 15 years to life imprisonment.

In calculating his advisory Guidelines range, the Probation Office determined that petitioner qualified as a career offender under Section 4B1.1. See PSR ¶¶ 18, 41. That determination rested in part on the conclusion that, under the official commentary in

effect at the time, petitioner's instant Section 922(g)(1) conviction qualified as a "crime of violence" because the firearm that petitioner possessed was a short-barreled shotgun. See Sentencing Guidelines § 4B1.2, comment. (n.1) (2006). As a career offender, petitioner's total offense level was 37 and his criminal-history category was VI, yielding an advisory Guidelines range of 360 months to life imprisonment. PSR ¶ 79.

The district court agreed that petitioner qualified as a career offender under the Guidelines and sentenced him to 360 months of imprisonment. J.A. 2, (Doc. 69); see J.A. 29-30.

c. The court of appeals affirmed. J.A 15-40. Petitioner challenged his designation as a career offender, arguing that the instant conviction did not qualify as a "crime of violence" because he was convicted only of unlawful possession of a firearm by a felon, not of unlawful possession of a firearm listed in 26 U.S.C. 5845(a). J.A. 30.

Reviewing for plain error because petitioner had failed to preserve the argument below, J.A. 30, the court of appeals rejected petitioner's contention. J.A. 30-36. The court explained that the official commentary to Section 4B1.2 expressly provided that a Section 922(g)(1) offense qualifies as a crime of violence if the felon had possessed a short-barreled shotgun. J.A. 29. The court further determined that the district court had not committed reversible error in finding that the weapon petitioner possessed was a short-barreled shotgun. See J.A. 34-36.

d. This Court denied certiorari in October 2009, 558 U.S. 906, at which point petitioner's conviction and

sentence became final. See *Clay* v. *United States*, 537 U.S. 522, 527 (2003).

e. On June 22, 2010, the district court granted the government's motion under Federal Rule of Criminal Procedure 35(b) and reduced petitioner's sentence to 216 months for his substantial assistance to the government. J.A. 3 (Doc. 150).

3. a. Petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, arguing that he was incorrectly sentenced as a career offender because his offense of conviction was not a "crime of violence." J.A. 41-52. The district court denied the motion but issued a certificate of appealability. J.A. 153-154. The court ruled that petitioner's argument was foreclosed by the Eleventh Circuit's decision in *United States* v. *Hall*, 714 F.3d 1270 (2013), which held that "the definition of 'crime of violence' provided by the Guidelines commentary" was "authoritative" and binding with respect to the offense of possession of an unregistered short-barreled shotgun. *Id.* at 1274; see J.A. 153.

b. The court of appeals affirmed, stating that it was bound by its ruling in *Hall*. J.A. 155-158.

c. Petitioner filed a petition for a writ of certiorari, arguing that his conviction did not qualify as a "crime of violence" under the residual clause of Section 4B1.2(a)(2). See 14-7390 Pet. 10-11. This Court granted the petition, vacated the judgment, and remanded the case to the court of appeals for further consideration in light of *Johnson*. 135 S. Ct. 2928.

d. On remand, the court of appeals again affirmed the judgment of the district court denying petitioner's Section 2255 motion. J.A. 161-163. The court reiterated its earlier holding that petitioner's offense quali-

fied as a crime of violence under the commentary to Section 4B1.2 of the Guidelines. J.A. 162 (citing *Hall*, 714 F.3d at 1270). The court explained that this Court's ruling in *Johnson* "does not control this appeal" because petitioner's career-offender designation was "based not on the ACCA's residual clause, but based on express language in the Sentencing Guidelines classifying [petitioner's] offense as a 'crime of violence.'" J.A. 163 (emphasis omitted).

SUMMARY OF ARGUMENT

Petitioner is not entitled to collateral relief based on his claim of sentencing error. According to petitioner, the residual clause of the Guidelines' former definition of "crime of violence" was unconstitutionally vague and, as a result, the former commentary that the district court used to calculate his advisory Guidelines range was also invalid. He seeks a resentencing at which the court would consider a lower advisory Guidelines range. This Court should reject petitioner's request at the threshold because the new constitutional rule he seeks would not apply retroactively on collateral review. If the Court reaches the merits, it should hold that although the advisory Guidelines are subject to the vagueness doctrine, the commentary applied at petitioner's sentencing is not vague and was legally valid.

I. No dispute exists that the rule petitioner seeks would be "new" and would not be a "watershed" rule within the meaning of this Court's retroactivity precedents. Accordingly, the rule would apply retroactively on collateral review only if it qualifies as "substantive" rather than "procedural." That classification depends on whether the rule would function procedurally in practice: that is, whether it would regulate the man-

ner of imposing a sentence rather than setting the substantive limits on permissible sentences.

Petitioner's rule would function procedurally. Invalidating Section 4B1.2(a)(2)'s residual clause and the associated commentary would have the practical effect of reducing petitioner's advisory Guidelines range. That range plays an important procedural role in the sentencing process by establishing the initial benchmark for the district court's exercise of discretion under 18 U.S.C. 3553(a), and for that reason this Court has repeatedly held that a miscalculation of the range is a form of procedural error. But the advisory Guidelines range does not delimit the bounds of a lawful sentence. It functions as advice—influential advice, but advice nonetheless. Petitioner's rule is therefore not substantive. This Court has held that similar rules—such as the rule that a capital sentencing judge cannot assign weight to a vague aggravating factor—are procedural and thus not retroactive.

Petitioner's rule differs markedly from this Court's ruling in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), voiding the ACCA's residual clause for vagueness. The ACCA imposes higher statutory minimum and maximum sentences for a violation of Section 922(g). The *Johnson* rule therefore narrows the reach of a penalty statute. *Welch* v. *United States*, 136 S. Ct. 1257, 1265 (2016). Petitioner's rule, by contrast, would not change the range of statutorily authorized sentences for a class of offenders. Without finding any additional facts about petitioner's record or his offense, the district court could impose the same sentence in a resentencing proceeding as petitioner originally received, so long as the court began by consider-

ing a lower Guidelines range. That is the essence of a procedural rule.

Permitting petitioner and similarly situated prisoners to attack their sentences years after they were imposed would undermine the basic purpose of the retroactivity doctrine to leave undisturbed final sentences that were imposed in accordance with the governing procedural law. It would also inflict substantial reliance costs on the judicial system.

II. The Due Process Clause prohibits a court from calculating an advisory Guidelines range based on a provision that is so vague that a person of ordinary intelligence cannot understand what it means. The Guidelines range helps structure the sentencing proceeding, and the parties' arguments and the court's ultimate exercise of discretion are often framed in reference to that range. Unlike the general sentencing factors set forth in Section 3553(a), moreover, calculation of a Guidelines range calls for application of legal standards, yet a vague guideline means that such determinations cannot be made in a non-arbitrary manner. Given those features, relying on a vague guideline would seriously undermine the fairness of a sentencing proceeding and produce arbitrary results in violation of the Constitution's guarantee of due process in criminal adjudications. That procedural unfairness would be magnified by the substantial effect that Guidelines advisory ranges exert on sentences actually imposed.

Petitioner's advisory Guidelines range, however, was not calculated based on a vague guideline. Rather, the district court relied on an application note in the official commentary to Section 4B1.2 expressly defining "crime of violence" to include his firearm

offense. That note reflected the Commission's authoritative view about what offenses fell within the Guidelines term "crime of violence," without regard to the definitional provisions in the main text. Petitioner's contention that Section 4B1.2(a)(2)'s former residual clause was facially void for vagueness thus could not entitle him to relief.

In any event, even assuming *arguendo* that the application note interpreted the former residual clause, petitioner's vagueness claim fails. In adjudicating facial vagueness challenges, this Court has first construed the challenged provision in light of authoritative clarifying texts akin to the Commission's commentary and then determined whether the provision is vague as so construed. Construed in light of the commentary, the former residual clause was not vague at all with respect to those offenses that were expressly identified in the commentary. Petitioner suffered no deprivation of due process when his Guidelines range was calculated based on the unambiguous text of the official commentary.

ARGUMENT

PETITIONER IS NOT ENTITLED TO RESENTENCING ON COLLATERAL REVIEW BASED ON HIS CLAIM THAT HIS ADVISORY GUIDELINES RANGE WAS CALCULATED WITH A VAGUE GUIDELINE

As Justice O'Connor explained in her plurality opinion in *Teague* v. *Lane*, 489 U.S. 288 (1989), "[r]etroactivity is properly treated as a threshold question," and thus "before deciding [the merits of a constitutional claim, the Court] should ask whether such a rule would be applied retroactively to the case at issue." *Id.* at 300-301; see *id.* at 316. That sequence accords with this Court's "usual practice" of

"avoid[ing] the unnecessary resolution of constitutional questions." *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 197 (2009).

In this case, the new rule that petitioner seeks would not apply retroactively on collateral review because it would have "a procedural function" rather than "a substantive function," *Welch* v. *United States*, 136 S. Ct. 1257, 1266 (2016). See Part I, *infra*. That suffices to resolve this case. If this Court does reach the merits of petitioner's claim, it should hold that, although the advisory Sentencing Guidelines are subject to the Due Process Clause's prohibition on vague penal laws, petitioner was not denied due process when the district court calculated his advisory Guidelines range based on the unambiguous text of the Commission's official commentary. See Part II, *infra*.

I. THE RULE THAT PETITIONER SEEKS WOULD NOT APPLY RETROACTIVELY ON COLLATERAL REVIEW

Under this Court's established retroactivity doctrine, a new rule has a "substantive" function, and is therefore retroactive on collateral review, if it narrows the scope of a statute that defines an offense or fixes its punishment, forbids a kind of punishment, or excludes a kind of conduct or person from the State's power to punish. The new rule that petitioner asks this Court to adopt—that Section 4B1.2(a)(2)'s former residual clause was void for vagueness and that as a result the official commentary applied by the district court was invalid—would not function in any of those ways. Rather, it would function as a procedural rule by reducing a defendant's advisory Guidelines range, thus changing the initial benchmark that the district court must take into account in imposing a sentence

that satisfies the Section 3553(a) factors. Because of that intrinsically procedural function, petitioner's rule would not be retroactive on collateral review.

A. Whether Petitioner's Rule Applies Retroactively Depends On Whether It Has A Procedural Or Substantive Function

1. When this Court announces a new procedural rule, that rule "applie[s] retroactively to all cases, state or federal, pending on direct review or not yet final." *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987). But prisoners generally cannot invoke new procedural rules to obtain collateral relief from final convictions. Drawing on an approach earlier articulated by Justice Harlan, the plurality opinion in *Teague* concluded that "new constitutional rules of criminal procedure" generally "will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310; see *Mackey* v. *United States*, 401 U.S. 667, 675-702 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part). The full Court has since adopted that approach. See *Welch*, 136 S. Ct. at 1264.

As this Court explained in *Welch*, two categories of new legal rules are not subject to *Teague*'s retroactivity bar. See 136 S. Ct. at 1264. "First, '[n]ew substantive rules generally apply retroactively.'" *Ibid.* (emphasis and citation omitted; brackets in original). The *Teague* bar is concerned with rules of procedure, not the substantive reach of criminal statutes. "Second, new watershed rules of criminal procedure, which are procedural rules implicating the fundamental fairness and accuracy of the criminal proceeding, will also have retroactive effect." *Ibid.* (citation and internal quotation marks omitted). The only example of a watershed

rule that this Court has recognized is the right-to-counsel rule of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). See *Whorton* v. *Bockting*, 549 U.S. 406, 418-419 (2007).[1]

The *Teague* framework recognizes that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." 489 U.S. at 309 (plurality opinion). Collateral review has never been a "substitute for direct review." *Id.* at 306 (internal quotation marks omitted). Rather, its principal purposes are to deter state and federal courts from violating then-governing procedural law, see *ibid.*, and to provide a remedy when a defendant is imprisoned for conduct that is not criminal, *Bousley* v. *United States*, 523 U.S. 614, 620-621 (1998), or is subject to a sentencing range greater than what the law authorizes, see *Welch*, 136 S. Ct. at 1265. Where those purposes are not implicated, the overriding "interests of comity and finality" generally preclude relief. *Teague*, 489 U.S. at 308 (plurality opinion). As Justice Harlan explained, "[a] rule of law that fails to take account of * * * finality interests would do more than subvert the criminal process itself"; "[i]t would also seriously distort the very limited resources that society has allocated to the criminal process." *Mackey*, 401 U.S.

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[1] Petitioner has not disputed that the *Teague* framework applies in federal collateral review under Section 2255, and indeed he relies on it. Pet. Br. 12-13, 32-34; see *Welch*, 136 S. Ct. at 1264 (in light of the parties' positions, the Court "proceed[s] on th[e] assumption" that the *Teague* framework applies in a federal collateral challenge to a federal conviction").

at 691 (concurring in the judgments in part and dissenting in part).

2. In this case, petitioner asserts a "new" constitutional rule, because the invalidity of the Guidelines' residual clause and the associated commentary was not "*dictated* by precedent existing at the time [his] conviction became final" in 2009. *Chaidez* v. *United States*, 133 S. Ct. 1103, 1107 (2013) (citation omitted). Importantly for the retroactivity analysis, that rule is "new" not only because *Johnson* v. *United States*, 135 S. Ct. 2551, was decided in 2015, but also because to obtain relief petitioner must establish two additional novel propositions: that the vagueness doctrine applies to the advisory Guidelines and that if the Guidelines' residual clause is void so is the commentary applied by the district court here. Petitioner's asserted rule would therefore be "new" even if his conviction had become final after *Johnson*.

Petitioner is thus foreclosed from obtaining relief unless his asserted rule falls within one of the two categories exempt from the *Teague* bar. Petitioner does not contend that his asserted rule would be a "watershed" rule of criminal procedure. See *Welch*, 136 S. Ct. at 1264 (*Johnson* rule not watershed). Accordingly, petitioner's rule would apply retroactively only if it qualifies as "substantive" under *Teague*.

This Court "has determined whether a new rule is substantive or procedural by considering the function of the rule"—that is, the actual effect of the rule when applied in criminal cases. *Welch*, 136 S. Ct. at 1265. "A rule is substantive rather than procedural," the Court explained in *Welch*, "if it alters the range of conduct or the class of persons that the law punishes." *Id.* at 1264-1265 (quoting *Schriro* v. *Summerlin*, 542

U.S. 348, 353 (2004)). Thus, substantive rules include constitutional rules forbidding criminal punishment for certain primary conduct, *e.g.*, *Loving* v. *Virginia*, 388 U.S. 1 (1967); constitutional rules prohibiting the imposition of certain forms of punishment, such as the death penalty or mandatory life imprisonment without parole, on particular classes of offenders, *e.g.*, *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 734 (2016); statutory-interpretation decisions holding that a criminal offense does not reach certain primary conduct, *Bousley*, 523 U.S. at 620; and decisions voiding for vagueness a statutory provision defining a criminal offense or punishment, see *Welch*, 136 S. Ct. at 1265.

Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a more severe range of punishment than the law authorizes. *Summerlin*, 542 U.S. at 352 (quoting *Bousley*, 523 U.S. at 620). In those circumstances, the finality interests underlying *Teague* must give way because "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Montgomery*, 136 S. Ct. at 732 (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in the judgments in part and dissenting in part)).

In contrast, procedural rules regulate the "manner of determining" either guilt or punishment, but do not shield a defendant from criminal liability or from exposure to a particular sentencing range. *Welch*, 136 S. Ct. at 1265 (emphasis omitted) (quoting *Summerlin*, 542 U.S. at 353). Examples of procedural rules are rules that "'allocate decisionmaking authority' between judge and jury," *ibid.* (quoting *Summerlin*,

542 U.S. at 353), rules that "regulate the evidence that the court could consider in making its decision," *ibid.* (citing *Whorton*, 549 U.S. at 413-414, 417), and rules that govern the sort of considerations that a sentencing judge or jury may take into account, *e.g.*, *Lambrix* v. *Singletary*, 520 U.S. 518, 539-540 (1997); see pp. 24-26, *infra*. Such rules do not alter the authorized range of possible outcomes. Although in any given case procedural rules may have a significant effect on the outcome, a violation of those rules does not mean that any prisoner is serving a sentence that is not legally authorized or change the statutory range. For that reason, the advent of new procedural rules does not warrant upsetting final convictions in light of the overriding societal interest in the finality of criminal judgments.

Accordingly, the retroactivity question in this case depends on the "function" of the rule that petitioner seeks: whether, in practical operation, the rule would "alter[] the range of conduct or the class of persons that the law punishes" or instead regulate only the "manner of determining" an appropriate sentence. *Welch*, 136 S. Ct. at 1264-1265 (citations and emphasis omitted).

B. Petitioner's Asserted Rule Would Have A Procedural Function

An advisory Guidelines range structures the process of sentencing by providing the "lodestar" for the parties' arguments about an appropriate sentence and the district court's ultimate exercise of discretion. *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1342, 1345-1347 (2016). But a Guidelines range does not impose substantive limits on the range of legally authorized sentences. For that reason, a constitution-

al rule invalidating a provision of the advisory Guidelines or commentary would be procedural within the meaning of *Teague*.

1. As this Court has explained repeatedly since it rendered the Guidelines advisory in *United States* v. *Booker*, 543 U.S. 220 (2005), the Guidelines have an important, but ultimately procedural, role in a district court's determination of a lawful sentence. "The sentencing judge, *as a matter of process*, will normally begin by considering the presentence report and its interpretation of the Guidelines," *Rita* v. *United States*, 551 U.S. 338, 351 (2007) (emphasis added), and then "correctly calculating the applicable Guidelines range," *Gall* v. *United States*, 552 U.S. 38, 49 (2007). A failure to calculate the advisory Guidelines range, or a miscalculation of that range, constitutes "significant *procedural* error." *Id.* at 51 (emphasis added).

Once properly calculated, the advisory Guidelines range helps structure the process of determining a just sentence in light of the factors set forth at 18 U.S.C. 3553(a). The "initial benchmark" established by the range "provide[s] the framework" for the parties' arguments and the district court's exercise of discretion to select a sentence within the statutory range. *Molina-Martinez*, 136 S. Ct. at 1342. The parties may, for example, argue that the Guidelines range fails to take account of a fact about the defendant or the offense that should make a difference in the sentence. See *Rita*, 551 U.S. at 351. Or they may argue that the Guidelines range rests on a policy judgment that the district court should reject. See *id.* at 351, 357; see also *Spears* v. *United States*, 555 U.S. 261, 264-266 (2009) (per curiam); *Kimbrough* v. *United States*, 552 U.S. 85, 101 (2007).

Ultimately, the district court must make "an individualized assessment based on the facts presented" that takes account of "all of the [18 U.S.C. 3553(a)] factors," *Gall*, 552 U.S. at 49-50, in order to comply with the statute's "overarching" objective to "'impose a sentence sufficient, but not greater than necessary'" to fulfill the purposes of sentencing, *Kimbrough*, 552 U.S. at 101 (quoting 18 U.S.C. 3553(a)). In doing so, the court "may not presume that the Guidelines range is reasonable." *Gall*, 552 U.S. at 50. That is because although the Guidelines are entitled to "respectful consideration," their advisory function "permits the court to tailor the sentence in light of other statutory concerns as well." *Ibid.* (citation omitted). The advisory Guidelines range thus "inform[s] and instruct[s] the district court's determination of an appropriate sentence," but it does not cabin the district court's discretion to impose any sentence within the statutorily authorized range. *Molina-Martinez*, 136 S. Ct. at 1346.

The advisory Guidelines range also governs the depth of explanation that a district court must provide for a sentence. A within-Guidelines sentence requires less explanation if it is clear that "the judge rests his decision upon the Commission's own reasoning." *Rita*, 551 U.S. at 357. But if the judge "decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall*, 552 U.S. at 50.

Finally, the advisory Guidelines range can affect the structure and scope of appellate review. In reviewing a sentence for an abuse of discretion, the appellate court may apply a presumption of reasona-

bleness to a within-Guidelines sentence, but may not presume that an outside-Guidelines sentence is unreasonable. *Rita*, 551 U.S. at 347, 354-355. The court reviews whether the district court committed "procedural error" by miscalculating the advisory Guidelines range. *Gall*, 552 U.S. at 53. But a determination that the range was miscalculated does not render the sentence substantively unlawful. Rather, when a district court commits such an error, its decision is not "*procedurally* sound," *id.* at 51 (emphasis added), and the appellate court must "determine whether [the] district court in fact would have imposed a different sentence" if it had taken into account different advice from the Commission. *Molina-Martinez*, 136 S. Ct. at 1348. That may require a limited remand for further explanation from the district court or a full resentencing. See *ibid.*

The advisory Guidelines thus play a significant role in the determination of a fair sentence, but they do so by structuring the process of selecting a sentence in light of the Section 3553(a) factors, explaining the justification for the sentence, and confirming the reasonableness of the sentence on appellate review. Although a miscalculation of the Guidelines range is thus a "significant procedural error," *Gall*, 552 U.S. at 51, such an error could not result in a sentence beyond what Congress has authorized.

2. Because of the procedural nature of a Guidelines-range-miscalculation error, the rule that petitioner seeks is a procedural rule within the meaning of this Court's retroactivity precedents. The practical effect of that rule would be to lower the advisory Guidelines range that the district court would take into account in a resentencing proceeding. That would

affect the process of determining a sentence by changing the critical starting benchmark. But the rule would not "alte[r] the range of conduct or the class of persons that the law punishes." *Welch*, 136 S. Ct. at 1267 (quoting *Summerlin*, 542 U.S. at 353) (brackets in original). Even if he prevails on his claim, petitioner will still be subject to the same statutory range of punishment, and the district court would be authorized to impose a sentence within that range on remand without finding any additional facts about petitioner's history or offense. Cf. *Montgomery*, 136 S. Ct. at 734 (holding retroactive rule requiring lesser sentence unless court finds that juvenile defendant's offense "reflect[s] irreparable corruption").

The practical effect of petitioner's asserted rule would be only to alter one of the *considerations* before the court—the sentencing range recommended by the Sentencing Commission—and potentially to require the court to provide a more detailed explanation for the sentence and to change whether a presumption of reasonableness applies on appeal. But just as a rule that "regulate[s] the evidence that [a] court could consider in making [a] decision" qualifies as procedural, *Welch*, 136 S. Ct. at 1265, a rule that alters the considerations that a court must take into account in deciding an appropriate sentence is procedural because it governs the *manner* of arriving at a decision, not the substantive bounds of a permissible sentence.

In fact, this Court has already held that materially similar rules—that is, rules that establish what considerations a sentencing judge or jury may or may not take into account in imposing a sentence—are procedural under *Teague*. This Court's decision in *Lambrix* is particularly relevant. *Lambrix* held that the Eighth

Amendment rule of *Espinosa* v. *Florida*, 505 U.S. 1079 (1992) (per curiam), did not apply retroactively on collateral review. 520 U.S. at 520, 539-540. *Espinosa* involved Florida's capital-sentencing framework, in which a jury weighed aggravating and mitigating factors and made a recommendation to the judge about whether to impose the death penalty, and then the judge conducted her own balancing of aggravating and mitigating favors in making the final determination, giving "great weight" to the jury's recommendation. See 505 U.S. at 1080, 1082. This Court held that under that scheme, if a jury recommending death weighs an aggravating factor that is unconstitutionally vague, the vague factor taints the judge's imposition of a capital sentence because of the deference owed to the jury's recommendation. See *id.* at 1082; see also *Lambrix*, 520 U.S. at 528.

In *Lambrix*, after holding that the *Espinosa* rule was "new," 520 U.S. at 528-539, the Court had little trouble concluding that "th[e] exception [for substantive rules] has no application to this case," *id.* at 539. The *Espinosa* rule, the Court explained, "neither decriminalize[s] a class of conduct nor prohibit[s] the imposition of capital punishment on a particular class of persons." *Ibid.* (brackets in original) (quoting *Saffle* v. *Parks*, 494 U.S. 484, 495 (1990)). The Court therefore held that the capital prisoner could not obtain collateral relief on his claim that the sentencing judge had improperly relied on a vague factor in imposing a death sentence. See *id.* at 540.

Lambrix confirms that petitioner's asserted rule is procedural, not substantive. Like the prisoner in *Lambrix*, petitioner contends that the district court improperly took into account an unconstitutionally

vague sentencing factor in the process of determining a just sentence, creating an intolerable "potential for arbitrariness," *Espinosa*, 505 U.S. at 1082. And just as in *Lambrix*, any conclusion that petitioner's advisory Guidelines range was too high would neither decriminalize a class of conduct nor prohibit the imposition of any sentence within the statutory range on a particular class of persons.

That conclusion is fortified by this Court's other decisions holding that new rules governing the process of imposing capital punishment are not retroactive. For example, in *Beard* v. *Banks*, 542 U.S. 406 (2004), this Court held that the rule of *Mills* v. *Maryland*, 486 U.S. 367 (1988)—that capital juries cannot be required to disregard mitigating factors not found unanimously—was not substantive. See *Beard*, 542 U.S. at 408, 417. Likewise, this Court held in *Saffle* that a proposed constitutional rule barring an anti-sympathy instruction to a capital jury would not be retroactive. 494 U.S. at 486, 495. Under the rules at issue in both *Beard* and *Saffle*, therefore, the capital-sentencing jury should have considered a different mix of factors than it did in selecting an appropriate sentence. Petitioner makes essentially the same type of argument: that in imposing a sentence, the district court should have considered a lower advisory Guidelines range than it did. As in those cases, that rule is ultimately procedural, because it concerns the manner in which the sentencer arrived at a sentence, not whether petitioner is legally eligible for a particular sentencing range.

3. Contrary to the contentions of petitioner and his amici, this Court's holding in *Welch* that the *Johnson*

rule is substantive does not mean that petitioner's proposed rule would be substantive.

a. *Johnson* invalidated as vague the residual clause of the ACCA, which establishes higher statutory minimum and maximum sentences for a class of offenders who violate 18 U.S.C. 922(g). See 18 U.S.C. 924(e). The practical effect of that holding was to render a class of offenders—*i.e.*, those offenders who would qualify for an ACCA sentence only under the residual clause—ineligible for the ACCA's sentencing range of 15 years to life. See *Welch*, 136 S. Ct. at 1265. After *Johnson*, certain offenders previously subject to the ACCA's sentencing range were subject to sentences of no more than ten years for their violations of 18 U.S.C. 922(g)(1). See 18 U.S.C. 924(a)(2).

The *Johnson* rule therefore clearly has a substantive function. Applying the ACCA's unconstitutionally vague residual clause raises the *statutory* minimum and maximum terms of imprisonment so that the defendant is exposed to a wholly new and unauthorized range of sentencing options. *Welch*, 136 S. Ct. at 1265. That error thus directly implicates the separation-of-powers principle that federal courts may not "exact a penalty that has not been authorized by any valid criminal statute." *Id.* at 1268. And accordingly, giving retroactive effect to that rule accords with the basic reason that substantive rules are exempt from the *Teague* retroactivity bar: that the important interest in finality must give way to the bedrock principle that a person should not face punishment that the law does not authorize.

In the Guidelines context, in contrast, sentencing a defendant in light of an erroneous application of Section 4B1.2 does not alter the statutory boundaries for

sentencing set by Congress for the crime. It results in incorrect *advice* to the sentencing court on an important sentencing factor, and as a result it seriously distorts the ensuing process. See Part II.A, *infra*. But it does not authorize an otherwise-inapplicable statutory mandatory-minimum sentence or produce a higher-than-otherwise-applicable statutory maximum.

b. Petitioner also contends (Br. 34-41) that declining to give retroactive effect to his asserted rule, while giving retroactive effect to the *Johnson* rule for ACCA sentences, "would represent a radical departure from this Court's categorical approach to retroactivity," under which "new substantive rules 'must be applied in * * * all federal habeas corpus proceedings.'" Br. 34 (emphasis omitted) (quoting *Danforth* v. *Minnesota*, 552 U.S. 264, 266 (2008)).

That argument rests on a mistaken assumption: that the rule that petitioner seeks is the same rule that this Court announced in *Johnson* and held retroactive in *Welch*. As explained above, it is not. See p. 18, *supra*. Although *Johnson*'s holding that the particular language of the ACCA's residual clause is impermissibly vague is a necessary predicate of petitioner's rule, petitioner also asks this Court to make two further, new determinations: that a vague advisory Guidelines provision is constitutionally void and that as a result the commentary that the district court used to calculate his Guidelines range was invalid. *Those* further determinations are the ones that infuse petitioner's asserted constitutional rule with a procedural character because of the advisory Guidelines' fundamentally procedural role in the overall sentencing process.

Holding petitioner's asserted rule non-retroactive therefore does not violate this Court's categorical approach to retroactivity on collateral review. The *Johnson* holding, which functions to reduce the statutorily authorized sentence for a class of offenders and is therefore substantive, applies to all defendants on collateral review. The rule that petitioner seeks, which would function to change the advice that district courts consider in imposing sentences within an authorized range and would therefore be procedural, should not apply to any defendants on collateral review.[2]

Such a divergence between rules with similar origins is not novel. It has long been recognized that two rules sharing the same "underlying constitutional source" can differ in their "function" and thus in their retroactive applicability. *Welch*, 136 S. Ct. at 1265. For example, in his foundational retroactivity opinion in *Mackey*, Justice Harlan pointed to the "divergent ways" in which the new rule announced in *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), applied in *Mackey* and *United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971), to demonstrate that "[s]ome rules may have both procedural and substantive ramifications." *Mackey*, 401 U.S. at 692 n.7 (concurring in the

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[2] As petitioner notes (Br. 38-40, 45), the government previously took the position that ACCA and Guidelines errors were to be treated the same for retroactivity purposes, and some courts of appeals adopted that view. The government has since reconsidered that position and believes that such an approach is inconsistent with this Court's precedents defining a substantive rule that is retroactive to cases on collateral review, which focus on the function of the new rule, not its legal source. See *Welch*, 136 S. Ct. at 1265-1266.

judgments in part and dissenting in part). *Marchetti* and *Grosso* held that a defendant who asserts his Fifth Amendment privilege against self-incrimination may not be prosecuted for failing to register as a gambler and pay the related gambling excise tax. *Marchetti*, 390 U.S. at 60-61; *Grosso*, 390 U.S. at 67. In *United States Coin & Currency*, Justice Harlan's opinion for the Court explained that the holdings of *Marchetti* and *Grosso* applied retroactively in a forfeiture proceeding based on failure to file the incriminating tax documents. 401 U.S. at 723-724.

But in his concurring opinion in *Mackey*, decided on the same day, Justice Harlan concluded that the rule announced in *Marchetti* and *Grosso* did *not* apply retroactively to warrant habeas relief for a prisoner who had been convicted for failure to pay income tax, even though the government had introduced his wagering-excise-tax returns at trial. 401 U.S. at 700. Justice Harlan explained that, unlike the defendant in *United States Coin & Currency*, who was penalized for failure to file the incriminating tax documents, Mackey was being punished for conduct—evading payment of federal income tax—that was not constitutionally immune from punishment. *Ibid.* Mackey claimed only that "the procedures utilized in procuring his conviction were vitiated by" *Marchetti* and *Grosso*. *Id.* at 701.

The distinction between the *Mackey* and *United States Coin & Currency* rules confirms that the practical effect of applying a new rule in a given context, and not the constitutional doctrine vindicated by the new rule, establishes whether the rule is entitled to retroactive application. Declining to give retroactive effect to a rule declaring an advisory Guidelines provi-

sion void—which would have the effect only of changing the district court's manner of arriving at a sentence under Section 3553(a)—is fully consistent with giving retroactive effect to *Johnson*'s invalidation of the ACCA's residual clause, which lowered the range of statutorily authorized punishment.

4. This Court has recognized that, as a practical reality, the Guidelines exert a significant effect on the sentences actually imposed in most cases. See *Molina-Martinez*, 136 S. Ct. at 1345-1346. This Court has relied on the Guidelines' significant effect on actual sentences in holding that they are subject to the Ex Post Facto Clause, see *Peugh* v. *United States*, 133 S. Ct. 2072, 2084 (2013), and that a Guidelines-range-miscalculation error will typically be prejudicial, see *Molina-Martinez*, 136 S. Ct. at 1346. And as explained in Part II.A of this brief, that significant effect is part of why the Due Process Clause prohibits application of a vague guideline in calculating the advisory range. See pp. 44-45, *infra*.

But that significant effect does not support the conclusion that a ruling that a guideline is unconstitutionally vague would be a substantive rule under *Teague*. This Court has held many constitutional rules to be procedural that undoubtedly exert a significant effect not only on the length of a term of imprisonment, but also on whether the defendant is found guilty at all (or pleads guilty) and whether he is sentenced to death. As discussed, this Court has held that constitutional rulings about the mix of considerations that a capital-sentencing judge or jury may consider are not retroactive. See pp. 24-26, *supra*. This Court has held that the rule in *Crawford* v. *Washington*, 541 U.S. 36, 68-69 (2004), that the Confrontation

Clause does not permit testimonial hearsay absent a prior opportunity for cross-examination does not apply retroactively. *Whorton*, 549 U.S. at 409. And it has held that a Sixth Amendment rule requiring defense counsel to warn a defendant about the immigration consequences of pleading guilty, *Padilla* v. *Kentucky*, 559 U.S. 356, 360 (2010), is not retroactive. *Chaidez*, 133 S. Ct. at 1105.

Each of those important procedural rules undoubtedly exerts a significant effect on findings of guilt or the imposition of capital punishment in many cases. Yet this Court recognized that, outside of the narrow watershed category, the impact of a new procedural rule on the likelihood of conviction or the likelihood of an increased sentence is not relevant to the retroactivity analysis, because the principle of *Teague* is that final convictions and sentences obtained in compliance with governing procedural law should remain final. The only difference here is that the effect of a lower advisory Guidelines range on actual sentences can more readily be shown through statistics. But that more easily documentable effect does not render petitioner's asserted rule any more substantive than other important procedural rules that can change the outcomes of criminal adjudications.

5. Petitioner's amici suggest that this Court should hold that petitioner's asserted rule is substantive because the career-offender guideline has a particularly severe effect and covers a broad range of offenses. See Public Defenders Amicus Br. 3-17. They further claim that because African-American citizens are disproportionately arrested and prosecuted for predicate drug and violent crimes, the career-offender

guideline exacerbates racial disparities in sentencing. See *id.* at 18-26.

As an initial matter, Section 4B1.2(a)(2)'s definition of crime of violence also applies to many other provisions of the Guidelines, not only the career-offender guideline. See §§ 2K1.3 & comment. (n.2), 2K2.1 & comment. (n.1), 2S1.1 & comment. (n.1), 4A1.1(e) & comment. (n.5), 4A1.2(p), 5K2.17 & comment. (n.1), 7B1.1(a)(1) & comment. (n.2). But in any event, the severity or perceived unfairness of a guideline has nothing to do with whether a rule invalidating the guideline is substantive or procedural. Because all Guidelines provisions are equally advisory, no greater justification exists for treating an erroneous career-offender designation as a substantive error eligible for correction on collateral review than for treating other errors in calculating the Guidelines range as substantive. Doing so would destabilize this Court's established retroactivity framework and sow confusion in lower courts.

C. Declining To Give Petitioner's Rule Retroactive Effect Accords With The Basic Purposes Of Collateral Relief

This Court derived the *Teague* retroactivity framework from "the purposes for which the writ of habeas corpus is made available": to ensure that courts follow then-governing procedural law and to free prisoners from convictions and sentences that are not legally authorized. 489 U.S. at 305-306 (plurality opinion) (citation omitted). *Teague* teaches that when those important purposes are not implicated, the societal interest in the finality of criminal convictions generally forecloses judicial relief from final convictions. As Justice Harlan recognized, retrials and resentencings

require "expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final." *Mackey*, 401 U.S. at 691 (concurring in the judgments in part and dissenting in part). And that "drain on society's resources is compounded" by the need to "relitigate facts buried in the remote past." *Ibid.*

Those basic concerns are acutely implicated by a rule that would potentially lead to thousands of resentencing proceedings for defendants who were originally sentenced years ago and whose statutory sentencing ranges remain unchanged. In suggesting that the disruption will be minimal, petitioner's amici seem to assume that only those sentenced as career offenders would be eligible for retroactive relief—which even petitioner's amici acknowledge would require thousands of new Section 2255 proceedings. See Public Defenders Amicus Br. 2. But as explained, the Section 4B1.2 definition of "crime of violence" applies to many other provisions of the Guidelines. See p. 33, *supra*. Those provisions involve substantial numbers of prisoners. For example, in fiscal year 2015 alone, more than 2500 defendants had their advisory Guidelines ranges calculated under Section 2K2.1(a), which relates to firearms, based on their commission of at least one crime of violence or drug-trafficking offense. See U.S. Sent. Comm'n, *Fiscal Year 15 Use of Guidelines and Specific Offense Characteristics (Offender Based)* 54.[3] That number reflects only one year for

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[3] http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2015/Use_of_SOC_Offender_Based.pdf.pdf.

only one of the many Guidelines provisions that would be affected by a ruling that the former residual clause and accompanying commentary of Section 4B1.2(a) is void for vagueness. The total number, which would include convictions obtained many years ago, would likely be substantial.

The amici's assessment also does not account for the many prisoners who will ultimately be unsuccessful in seeking retroactive relief, but only after protracted proceedings in lower courts. Unlike a substantive rule requiring a prisoner to be released because his conduct was not criminally proscribed or because he is ineligible for his sentence, petitioner's asserted rule, if applied retroactively, would lead to complicated proceedings in district and appellate courts and tie up government resources that would otherwise be used to prosecute new crimes. Even for the many prisoners who ultimately will not succeed on their claims or who will not receive a significant sentence reduction, prosecutors and district judges will have to make a host of determinations, such as whether the petition is time-barred or procedurally defaulted; whether the conviction at issue qualifies as a crime of violence under other provisions of Section 4B1.2(a); the impact of this Court's recent decision in *Mathis* v. *United States*, 136 S. Ct. 2243 (2016), on that analysis; and the effect of any plea-bargain waivers. In addition, for any given case, prosecutors might be required to locate old sentencing transcripts, court-reporter steno notes, case files, and state-court documents, if such documents are even still available. The government and the district court may also be required to investigate any claims of rehabilitation by the prisoner since his original sentencing. See *Pepper*

v. *United States*, 562 U.S. 476, 481 (2011). Those substantial costs of reopening long-final criminal judgments are part of the reason that this Court has held that new procedural rules do not apply retroactively.

Holding the rule that petitioner seeks retroactive would also impose unwarranted costs on the public to the extent that it releases dangerous recidivists into communities. According to a Commission report from earlier this year, 47.6% of those subject to the career-offender guideline or the armed-career-criminal guideline (Section 4B4.4) released in 2005 were later convicted of another offense, compared to 31.7% of all federal inmates. U.S. Sent. Comm'n, *Recidivism Among Federal Offenders: A Comprehensive Overview* App. A-2 (Mar. 2016) (*Comprehensive Overview*).[4] And almost 70% of career offenders or armed career criminals were rearrested. *Id.* App. A-1. As the Commission's report summed up, those two guidelines "serve as good predictors of future recidivism." *Id.* at 19.[5] Dramatically reducing sentences for that

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[4] http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.

[5] Petitioner's amici nevertheless claim that Commission studies show that career-offender status is not "a good measure of the risk of recidivism." Public Defenders Amicus Br. 26-27 & nn.114-117. Amici note that offenders with criminal-history levels of IV or V had higher rearrest rates than career offenders and armed career criminals (74.7% and 77.8% as compared to 69.5%). See *Comprehensive Overview* App. A-1. But that fairly small difference may well be attributable to the fact that career offenders serve longer sentences and are thus much older when released. As the Commission's report shows, recidivism rates are lower for offenders who serve 120 months or more than for offenders who serve 24 to 119 months. See *ibid.* The basic function of the career-offender

class of dangerous recidivists would thus be detrimental to public safety.

Importantly for retroactivity purposes, that cost would be attributable in part to this Court's shifting vagueness jurisprudence. This Court twice—in 2007 and 2011—upheld the ACCA's residual clause. *Johnson*, 135 S. Ct. at 2556. Had this Court concluded in 2007 that its language was unconstitutionally vague, the Sentencing Commission most likely would have revised the identically worded guideline quickly, as it did after *Johnson*, to ensure that violent crimes were included another way. The Commission is capable of reacting quickly to legal change, in order to keep up with empirical knowledge and legal realities. If the Commission had acted, individuals sentenced between 2007 and 2015 would have been classified as career offenders without the constitutional problem that this Court identified for the first time in *Johnson*. The *Teague* retroactivity bar is designed precisely to avoid those sorts of serious reliance costs when this Court changes course in its constitutional doctrine.

II. PETITIONER WAS NOT DENIED DUE PROCESS IN HIS SENTENCING PROCEEDING

The district court classified petitioner's felon-in-possession conviction as a crime of violence because the firearm that petitioner possessed was a short-barreled shotgun and the official commentary to Section 4B1.2 stated at the time that "'[c]rime of violence' does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a)." Sentencing

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guideline, after all, is to advise a court to protect society from individuals who are likely to commit further crimes if released.

Guidelines § 4B1.2, comment. (n.1) (2006). Although petitioner does not dispute that his offense of conviction is clearly encompassed by that text, he nevertheless claims that his sentence violated the Due Process Clause's prohibition on vague penal laws. It did not. Although the government agrees that the advisory Sentencing Guidelines are subject to the vagueness doctrine, any defendant sentenced under the unambiguous text of the commentary received due process.

A. The Advisory Sentencing Guidelines Are Subject To The Due Process Clause's Prohibition On Vague Penal Laws

The government agrees that the advisory Sentencing Guidelines are subject to the constitutional "prohibition of vagueness in criminal statutes." *Johnson*, 135 S. Ct. at 2556-2557. That conclusion is not "dictated" by this Court's precedents in the strong sense required by *Teague*. See *Chaidez*, 133 S. Ct. at 1107 (rule "would have been 'apparent to all reasonable jurists'") (citation omitted); *Butler* v. *McKellar*, 494 U.S. 407, 415 (1990) (rule can be "new" even if it is correct and "within the 'logical compass' of an earlier decision"). But given this Court's precedent reinforcing the importance of a Guidelines range in the sentencing process and the constitutional doctrine in closely related contexts, it would violate the Due Process Clause's basic guarantee of fairness in criminal adjudications to sentence a defendant based on a guideline that is too vague for a person of ordinary intelligence to understand.

1. The "void-for-vagueness doctrine requires that a penal statute define [a] criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not

encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). In *Johnson*, this Court held that the doctrine applies not only to laws defining the elements of offenses, but also to "statutes fixing sentences" for indisputably criminal conduct. 135 S. Ct. at 2557.

The vagueness doctrine is "an outgrowth * * * of the Due Process Clause of the Fifth Amendment." *United States* v. *Williams*, 553 U.S. 285, 304 (2008); see *Collins* v. *Kentucky*, 234 U.S. 634, 638 (1914). As *Johnson* explained, "[t]he prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" 135 S. Ct. at 2556-2557 (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926)). The doctrine not only ensures fair notice of criminal offenses and sentences, but also prevents the legislative body from "impermissibly delegat[ing] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972). This Court has explained that this latter function in preventing the arbitrary enforcement of criminal laws is "the more important aspect of vagueness doctrine." *Kolender*, 461 U.S. at 357-358.

In preventing arbitrariness, the doctrine also bolsters the due process right of criminal defendants to procedurally fair adjudications. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers* v. *Mississippi*, 410 U.S. 284, 294 (1973). But where the standard for crim-

inal liability or punishment is so opaque that a person of ordinary intelligence cannot understand it, a criminal defendant lacks a genuine opportunity to defend against the government's accusations, no matter how scrupulously the court observes other procedural requirements. The vagueness doctrine thus protects the integrity of the judicial system by ensuring that criminal adjudications are not conducted arbitrarily and that terms of imprisonment are not imposed based merely on the "*ad hoc* and subjective" whims of the judge or jury. *Grayned*, 408 U.S. at 108-109.

2. In light of those basic purposes of the vagueness doctrine, a district court's use of a vague guideline to calculate an advisory Guidelines range violates the Due Process Clause. It is true that the advisory Guidelines neither define criminal offenses nor fix sentences. But given the Guidelines' central role in the sentencing process and their substantial practical effect on the sentences ultimately imposed, a vague guideline would offend the due process values of notice, consistency, and the integrity of the judicial system that the vagueness doctrine safeguards.

a. Two intrinsic features of the advisory Sentencing Guidelines give rise to the due process problem when a court uses a vague guideline to calculate the advisory range.

First, correctly calculating the advisory range is a necessary and important step in the process of imposing a sentence. As this Court recently explained, the function of the advisory Guidelines range is to "provide the framework" for the district court's exercise of discretion under 18 U.S.C. 3553(a). *Molina-Martinez*, 136 S. Ct. at 1342. Once the advisory Guidelines range is calculated, the parties have an "initial benchmark"

from which to "argue for whatever sentence they deem appropriate." *Gall*, 552 U.S. at 49; see *Molina-Martinez*, 136 S. Ct. at 1342. Their arguments often key off of that range: Does the defendant or offense conduct have special characteristics that are not taken into account in the Guidelines? Is the policy reflected in the Guidelines ill-advised? Does new information cast doubt on the Commission's empirical assumptions?

Central features of post-*Booker* sentencing procedure reinforce the importance of the initial Guidelines-range calculation in structuring the ensuing process of arriving at a just sentence. See *Peugh*, 133 S. Ct. at 2080. The district court generally must provide a greater explanation for a sentence outside the Guidelines range. A miscalculation of the range is a significant procedural error that requires resentencing if prejudicial. And an appellate court may presume that a within-Guidelines sentence is reasonable. See pp. 21-23, *supra*.

Given those features of the post-*Booker* sentencing regime, it would undermine the fairness of a sentencing proceeding to require application of a guideline that lacks "sufficient definiteness that ordinary people can understand" what conduct, prior convictions, or offense characteristics dictate the Guidelines range. *Kolender*, 461 U.S. at 357. Although that range does not bind the court like a statutory range, it "anchor[s] both the district court's discretion and the appellate review process." *Peugh*, 133 S. Ct. at 2087. If that starting point is skewed by Guidelines language that is inscrutable, then the ensuing sentencing process risks becoming intolerably arbitrary, because it will

have unfolded from a judicial determination that was by definition arbitrary.

Second, the advisory Sentencing Guidelines are designed to yield a precise numeric range that should be identical for defendants with identical criminal histories and offense characteristics, without regard to the sentencing judge's discretionary judgment about what sentence is warranted. In that respect, the calculation of an advisory Guidelines range differs critically from the district court's discretionary application of the Section 3553(a) factors at a later point in the sentencing process. At that stage, the defendant is directed to focus his arguments on the full gamut of relevant sentencing considerations in an effort to persuade the sentencing judge to be lenient: not just the recommendation of the Sentencing Commission, but also his offense characteristics and his criminal history, the deterrent effect of the sentence, his capacity for rehabilitation, and basic notions of justice. 18 U.S.C. 3553(a)(1)-(2). American judges have long made those sorts of judgments in indeterminate-sentencing schemes, and this Court has never understood such discretionary determinations to raise vagueness concerns.

Calculating the advisory Guidelines range is fundamentally different. That threshold stage calls for the application of a legal text to facts. The judge has no discretion to misapply the law or erroneously find facts. The defendant is accordingly limited to making narrow, often wholly legal, arguments, *e.g.*, whether a prior conviction or offense characteristic falls within the text of the relevant guideline or its commentary. But if a Guidelines provision cannot be understood by a person of ordinary intelligence, the defendant and

the court face an impossible task. The defendant, on the one hand, must limit his contentions to the argument that a particular fact does or does not fit within the text of a Guidelines provision. But, on the other hand, he is confronted with a provision that is "so shapeless" that a court could not "derive meaning" from it. *Johnson*, 135 S. Ct. at 2560.

The inherent impossibility of that endeavor—at this important stage of the sentencing process—offends due process. The government may not establish a sentencing process that hinges on a legal determination that is impossible to make in a non-arbitrary manner. See *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 403 (1966) ("Implicit in [due process] is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce."). An inscrutably vague guideline thus introduces an unacceptable degree of arbitrariness into the procedural "framework" for sentencing. *Molina-Martinez*, 136 S. Ct. at 1342.

This Court, in fact, has recognized in the Eighth Amendment context that a vague sentencing factor at the outset of the sentencing process can taint the sentence. As discussed above (see pp. 24-25, *supra*), in *Espinosa*, *supra*, this Court held that the Eighth Amendment is violated when a capital jury is instructed on a vague aggravating factor and the judge ultimately imposing the sentence gives weight to the jury's recommendation. 505 U.S. at 1082. Even though the judge does not directly consider the aggravating factor, the "indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor." *Ibid.* The same "potential for arbi-

trariness" exists when a vague guideline initiates and structures the non-capital sentencing process.

b. Because of the Guidelines' central role in the process of sentencing, the calculated range generally exerts a significant effect on the actual sentence. As this Court has explained, statistical analysis "demonstrate[s] the real and pervasive effect the Guidelines have on sentencing": "In most cases district courts continue to impose 'either within-Guidelines sentences or sentences that depart downward from the Guidelines on the Government's motion.'" *Molina-Martinez*, 136 S. Ct. at 1346 (quoting *Peugh*, 133 S. Ct. at 2084). Perhaps most significantly, "when a Guidelines range moves up or down, offenders' sentences [tend to] move with it." *Ibid.* (brackets in original) (quoting *Peugh*, 133 S. Ct. at 2084). That correlation is attributable in part to the fact that the Guidelines "reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives," and so often a "judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a)." *Rita*, 551 U.S. at 350-351. But it also demonstrates that the Guidelines' numerical anchor can influence the sentence imposed because district judges often give significant weight to the Commission's recommendation. For that reason, "the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar." *Ibid.*

That legally reinforced reality supports the conclusion that the Due Process Clause prohibits application of a vague guideline. If a key determinant of a defendant's sentence is so hard to decipher that persons of ordinary intelligence—including judges—cannot understand it, then the resulting sentence will reflect

arbitrary judicial decisionmaking: the fortuity of which interpretation of an enigmatic provision the sentencing judge seizes on. That is neither reasoned application of law to fact nor the exercise of judgment. Although no sentencing system will be entirely consistent across offenders, the Due Process Clause does not permit a patently arbitrary determination to have such a substantial effect on the sentences imposed for criminal offenses.

c. Precisely because of the advisory Guidelines' central role in the process of sentencing and their significant influence over the actual sentences imposed, this Court has held that the Guidelines are subject to the Ex Post Facto Clause. *Peugh*, 133 S. Ct. at 2078. That conclusion has great significance here. *Peugh* explained that, in addition to ensuring fair notice to criminal defendants, the Ex Post Facto Clause "reflects principles of 'fundamental justice.' " *Id.* at 2085 (plurality opinion) (quoting *Carmell* v. *Texas*, 529 U.S. 513, 531 (2000)). As the en banc Seventh Circuit has noted, *Peugh*'s "reference to 'fundamental justice' captures the Ex Post Facto Clause's concern about arbitrary governmental action," and "[v]agueness doctrine reflects the same concern[]." *United States* v. *Hurlburt*, No. 14-3611, 2016 WL 4506717, at *7 (Aug. 29, 2016). Thus, a defendant confronted with a vague guideline finds himself in much the same position as a defendant confronted with a guideline that was changed after he committed the offense. No established legal rule of discernible clarity will govern the calculation of his sentencing benchmark.

Beyond that, *Peugh* rejected the most substantial objection to applying either the Ex Post Facto Clause

or the vagueness doctrine to the Guidelines: that the Guidelines are now "only advisory." 133 S. Ct. at 2081. The Court held that this did not defeat the ex post facto problem because "[t]he federal system adopts procedural measures intended to make the Guidelines the lodestone of sentencing," *id.* at 2084, and "considerable empirical evidence indicat[es] that the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges." *Ibid.*; see *id.* at 2082-2084, 2085-2088.

A similar analysis controls here. When a district court applies a vague guideline, a considerable risk exists that an inherently arbitrary decision at the outset of the sentencing process will increase the sentence ultimately imposed. Like the Ex Post Facto Clause, the Due Process Clause does not tolerate a system in which a "significant risk of a higher sentence," *Peugh*, 133 S. Ct. at 2088 (internal quotation marks omitted), is created by a threshold determination that contravenes "ordinary notions of fair play and the settled rules of law," *Johnson*, 135 S. Ct. at 2557 (quoting *Connally*, 269 U.S. at 391).

3. Since *Johnson* held that sentencing provisions are subject to the vagueness doctrine, the only circuit to hold that the Guidelines are immune from vagueness scrutiny is the Eleventh Circuit. See *United States* v. *Matchett*, 802 F.3d 1185, 1189 (2015); see also *Hurlburt*, 2016 WL 4506717, at *8 (Hamilton, J., dissenting). The Eleventh Circuit's principal argument was that "[t]he vagueness doctrine * * * 'rest[s] on [a] lack of notice,'" *Matchett*, 802 F.3d at 1194 (brackets in original) (quoting *Maynard* v. *Cartwright*, 486 U.S. 356, 361 (1988)), and this Court held in *Irizarry* v. *United States*, 553 U.S. 708 (2008), that "[a]ny ex-

pectation subject to due process protection . . . that a criminal defendant would receive a sentence within the presumptively applicable guideline range did not survive [the] decision in *United States* v. *Booker*," 802 F.3d at 1194 (brackets and ellipsis in original) (quoting *Irizarry*, 553 U.S. at 713).

The Eleventh Circuit's reliance on *Irizarry* lacks merit. *Irizarry* held that, after *Booker*, neither the Due Process Clause nor Federal Rule of Criminal Procedure 32(h) requires a district court to give the parties notice before imposing a sentence that varies from the applicable Guidelines range. 553 U.S. at 713-716. The Court explained that "[n]ow faced with advisory Guidelines, neither the Government nor the defendant may place the same degree of reliance on the type of expectancy [of a within-Guidelines sentence] that gave rise to a special need for notice" under the mandatory Guidelines. *Id.* at 713-714 (internal quotation marks omitted).

That holding is entirely consistent with the conclusion that the Due Process Clause does not tolerate a vague guideline. *Irizarry* did not suggest that due process imposes no constraints on the advisory-Guidelines scheme. Rather, it addressed a specific notice claim and held that, given the *Booker* remedy that requires district courts, in every case, to treat the Guidelines as only advisory and to conduct an independent assessment of the Section 3553(a) factors, a defendant does not have a justifiable expectation that he will receive a within-Guidelines sentence. 553 U.S. at 713-714.

The problem with a vague guideline is not that it upsets an expectation that a defendant will receive a within-Guidelines sentence. Rather, a vague guideline

makes it impossible for courts and litigants to calculate the Guidelines range in a non-arbitrary manner. It therefore skews the sentencing process by anchoring the court to an inherently arbitrary determination. That inevitably yields arbitrarily imposed sentences—*i.e.*, sentences that depend in part on an inscrutably vague recommendation by the Sentencing Commission—which damages the fairness and integrity of the judicial system.

The Eleventh Circuit also expressed the concern that "[h]olding that advisory guidelines can be void for vagueness * * * would upend our sentencing regime," because "many [Guidelines] provisions could be described as vague." *Matchett*, 802 F.3d at 1196. The court gave as examples guidelines using the phrases "sophisticated means" and "minor participant." *Ibid.* (citing §§ 2B1.1(b)(10), 3B1.2(b)). But those provisions are not unconstitutionally vague. As *Johnson* explained, the residual clause is unique in requiring a court to apply a level of risk informed by a disparate list of enumerated offenses to an idealized "ordinary case" of an offense, including by inquiring into whether violent conduct would likely occur after the completion of the offense, and the ACCA's residual clause had confounded courts for years. See 135 S. Ct. at 2556-2563. *Johnson* expressly distinguished provisions, like those cited by the Eleventh Circuit, that "call for the application of a qualitative standard * * * to real-world conduct." *Id.* at 2561. Indeed, the government is not aware of any other Guidelines provision that has been declared unconstitutionally vague in the circuits that have permitted vagueness challenges to the Guidelines.

Finally, the Guidelines are not exempt from the prohibition on vague penal laws on the theory they "do not regulate primary conduct" but rather govern only sentencing judges. *United States* v. *Matchett*, No. 14-10396, 2016 WL 4757211, at *4-*5 (Sept. 13, 2016) (Pryor, J., respecting the denial of rehearing en banc). Although the Guidelines are directed to judges, the sentence is imposed on the defendant as a sanction for his primary conduct (just as the sentence in *Johnson* was imposed for Johnson's primary conduct). And "the advisory nature" of the Guidelines does not eliminate the due process concern that sentences will be imposed arbitrarily, *id.* at *4, given this Court's conclusion that the Guidelines provide "the framework for sentencing"; "anchor * * * the district court's discretion"; and can form "in a real sense the basis for the sentence" even when the judge varies from the range. *Molina-Martinez*, 136 S. Ct. at 1345.

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For the foregoing reasons, the Due Process Clause's guarantee of procedural fairness in criminal adjudications prohibits the use of a vague advisory guideline to establish the "lodestar" for the ensuing sentencing process. *Molina-Martinez*, 136 S. Ct. at 1346.

B. Petitioner Was Not Denied Due Process Because His Advisory Guidelines Range Rested On The Clear Text Of The Sentencing Commission's Commentary

Although the advisory Sentencing Guidelines are subject to the vagueness doctrine, the district court did not rely on any vague provision in calculating petitioner's Guidelines range. Rather, the court determined that petitioner's offense of conviction qualified as a "crime of violence," and therefore that peti-

tioner qualified as a career offender, because that offense was explicitly set out in the Commission's commentary to Section 4B1.2. J.A. 153; see Sentencing Guidelines § 4B1.2, comment. (n.1) (2006). Any due process concern that a vague guideline has skewed the sentencing process and resulted in an arbitrarily determined sentence is thus misplaced in this case.

Petitioner nevertheless contends that the district court's calculation of his advisory range violated the vagueness doctrine. According to petitioner, *Johnson* compels the conclusion that the former residual clause of Section 4B1.2(a)(2) was void for vagueness, and the official commentary that the district court invoked was invalid without the residual clause. That argument lacks merit, both because the relevant commentary did not purport to interpret the former residual clause, and because even if it did, the residual clause would not be unconstitutionally vague with respect to those applications expressly specified in the commentary.

1. The former commentary that the district court invoked did not construe Section 4B1.2(a)(2)'s residual clause or any other part of the definition set out in the guideline's main text. Rather, as this Court recognized in *Stinson* v. *United States*, 508 U.S. 36 (1993), "the commentary [was] a[n] * * * interpretation of the phrase 'crime of violence.'" *Id.* at 47. The commentary did not indicate that the enumerated offenses qualified as crimes of violence only under the residual clause. See Sentencing Guidelines § 4B1.2, comment. (n.1) (2006). The best interpretation of the former commentary is therefore that the Commission intended the enumerated offenses to qualify as crimes of

violence under the Guidelines without determining whether each offense satisfied a discrete portion of Section 4B1.2(a)'s definition.

That understanding is fortified by the history and structure of the Guidelines. When the Commission switched from the 18 U.S.C. 16 definition to the ACCA definition in 1989, it retained virtually the same list of enumerated crimes in the commentary, suggesting that the list did not reflect an interpretation of the main text. See Sentencing Guidelines App. C., Amend. 268. In addition, other provisions of the Guidelines in existence when the Commission added petitioner's instant offense in 2004 used the term "crime of violence" and provided that it "has the meaning given that term in §4B1.2 *and Application Note 1 of the Commentary* to §4B1.2." *Id.* §§ 2K1.3(a), comment. (n.2), 2K2.1, comment. (n.1) (2004) (emphasis added). That strongly indicates that the commentary sets out a definition of "crime of violence" *in addition to* the definition in Section 4B1.2(a)'s main text. And another provision of the Guidelines in effect in 2004 defined the term "crime of violence" exclusively in the commentary—confirming that the commentary can set out a definition of that term that does not construe any definitional provision in the main text. See *id.* § 2L1.2(b)(1)(A) & comment. (n.1(B)(iii)) (2004).

Petitioner contends (Br. 49-50) that when the Commission added the commentary identifying his offense of conviction as a crime of violence in 2004, it indicated that the commentary was meant to construe the former residual clause. That is not a fair reading of the amendment's explanatory note. See Sentencing Guidelines App. C., Amend. 674. The explanatory

note, in fact, said that "this amendment *expands the definition* of 'crime of violence' in Application Note 1 to § 4B1.2," confirming that the Commission understood the application note to provide an independent definition of "crime of violence." *Ibid.* (emphasis added). Although the Commission indicated that certain weapons offenses, including those that involve short-barreled shotguns, satisfied the residual clause, it went on to explain that it was adopting a "categorical rule" that possession of *all* Section 5845(a) firearms would qualify. *Ibid.*

Petitioner also contends (Br. 51) that by replacing the former residual clause with a list of enumerated offenses, the Commission's 2016 amendment to Section 4B1.2 demonstrates that the Commission understood those offenses to have been applications of the residual-clause standard. See Sentencing Guidelines App. C, Amend. 798. In promulgating that amendment, however, the Commission made clear that it had not previously understood a distinction between the offenses enumerated in the text and the offenses enumerated in the commentary: "For easier application," the Commission explained, "all enumerated offenses are now included in the guideline at §4B1.2," whereas "prior to the amendment, the list was set forth in both §4B1.2(a)(2) and the commentary at Application Note 1." *Ibid.* And although the Commission stated that offenses involving Section 5845(a) firearms meet the residual-clause standard, it further explained that those offenses were included in the list because of "Congress's determination that such weapons are inherently dangerous and, when possessed unlawfully, serve only violent purposes." *Ibid.*

Accordingly, because petitioner's advisory Guidelines range was calculated based on commentary that defined "crime of violence" independently of the former residual clause, he is not entitled to relief even if the Court holds that the residual clause was unconstitutionally vague.[6]

2. In any event, even assuming *arguendo* that the relevant application note was intended to interpret the former residual clause, its terms would still defeat petitioner's vagueness challenge.

a. As explained in Part II.A, *supra*, the Due Process Clause's prohibition on vague penal laws applies to the advisory Sentencing Guidelines. As a consequence, language that would be vague in a statute defining a criminal offense or a statute fixing a criminal penalty is also vague if it appears in a Guidelines provision without clarifying language or context. But it does not follow that *Johnson*'s holding declaring the ACCA's residual clause void for vagueness translates directly to the residual clause of Section 4B1.2(a)(2).

---

[6] Petitioner has not argued that if the Commission intended the former commentary to be a freestanding interpretation of "crime of violence," the commentary would be "inconsistent with, or a plainly erroneous reading of" Section 4B1.2(a) and thus invalid under *Stinson*, 508 U.S. at 38, 47. In any event, the Commission's judgment that a felon's possession of an especially dangerous weapon should be classified as a crime of violence is not plainly erroneous or inconsistent with that term. And although the main text of Section 4B1.2(a) uses the word "means," which typically indicates that a definition is exclusive, see *Colautti* v. *Franklin*, 439 U.S. 379, 392 n.10 (1979), that default rule is not so hard and fast as to render the freestanding definition in the commentary "plainly inconsistent" with the text. See 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* 47:7 (7th ed. 2014) ("[A] definition which declares what a term 'means' *usually* excludes any meaning not stated.") (emphasis added).

That is because the guideline differs in a critical respect from the ACCA: It contains "binding" commentary that serves as an "authoritative guide" to the meaning of the text and specifically identifies offenses that qualify as crimes of violence. *Stinson*, 508 U.S. at 42-43 (citation omitted).

As to such expressly identified offenses, including petitioner's offense of conviction, the Guidelines' former definition of "crime of violence" was not vague at all. Petitioner and similarly situated defendants had clear notice that committing offenses listed in the commentary would trigger career-offender status. While the vagueness holding of *Johnson* means that Section 4B1.2(a)(2)'s former residual clause was unconstitutionally vague as applied to offenses *not* specified in the commentary, nothing in this Court's vagueness jurisprudence supports the conclusion that petitioner was deprived of fair notice or subjected to arbitrary enforcement by the straightforward application of the commentary's express terms.

Reliance on the commentary to clarify the residual clause does not run afoul of *Johnson*. The Court did reject "the theory that a vague provision is constitutional merely because there is some conduct that [a court might think] clearly falls within the provision's grasp." 135 S. Ct. at 2560-2561. But the application notes play a different role than a court's intuition that *some* offenses "clearly" pose a serious potential risk of physical injury. *Ibid.* The specific offenses listed in the commentary absolve courts from having to apply the problematic text of the residual clause at all, and courts instead may rely on the Commission's determination. Applying those clearly stated offenses there-

fore produces none of the constitutional evils that the vagueness doctrine is designed to prevent.

b. Petitioner reaches the conclusion that the commentary is invalid only by flipping the normal order of operations in adjudicating vagueness challenges. According to petitioner (Br. 49), the first step in the analysis, before any consideration of the Guidelines' commentary, is to "excise[]" the residual clause of Section 4B1.2(a)(2) as unconstitutionally vague. With that change, petitioner says, the commentary "becomes inconsistent with the remaining text of the guideline" and therefore invalid under *Stinson*. *Ibid.*

That sequence squarely contradicts this Court's established approach to constitutional vagueness challenges in a wide array of contexts. For example, in *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), this Court upheld a quasi-criminal ordinance making it unlawful to sell merchandise "designed or marketed for use" with drugs without a license. *Id.* at 492, 500. The allegedly vague terms in the ordinance had been construed by "licensing guidelines prepared by the Village Attorney." *Id.* at 492. In holding that the phrases "designed * * * for use" and "marketed for use" were not unconstitutionally vague, the Court relied expressly on the guidelines' application of those terms to specific items and marketing methods. *Id.* at 500-502 & n.18. And in further holding that "the dangers of arbitrary enforcement" of the ordinance in the future did not warrant voiding the ordinance on its face, the Court explained that "[t]he village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance." *Id.* at 504.

Similarly, in *Grayned*, *supra*, the Court upheld a municipal "antinoise" ordinance enforced through criminal penalties. 408 U.S. at 106. The Court explained that "[w]ere we left with just the words of the [municipal] ordinance, we might be troubled." *Id.* at 111. But it rejected a vagueness challenge after determining from the state supreme court's precedents that state courts would likely interpret the ordinance narrowly. See *id.* at 111-112.

This Court's approach in *Hoffman* and *Grayned* is irreconcilable with petitioner's approach, which would invalidate the residual clause before construing it in light of the authoritative commentary. If that approach were correct, the Court would have invalidated the ordinances challenged in those cases on their face before considering the clarifying constructions by local officials and state courts. Indeed, petitioner's approach of maximum invalidation cannot be reconciled with the analogy that *Stinson* drew between the commentary and "an agency's interpretation of its own legislative rules," 508 U.S. at 45, because in adjudicating vagueness challenges to agency regulations, this Court has taken account of agency interpretations that "add[] precision to the regulations." *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 395 (1969); cf. *Hoffman Estates*, 455 U.S. at 494 n.5 ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or *enforcement agency* has proffered.") (emphasis added).

Perhaps most relevantly, petitioner's contention that the residual clause must be excised as vague before consulting the commentary is also inconsistent with the way this Court has evaluated claims that

aggravating or mitigating factors considered by capital juries are unconstitutionally vague. Under this Court's long-settled framework, if a federal court determines that "an individual statutory aggravating or mitigating circumstance * * * is itself too vague to provide any guidance to the sentencer," the federal court "must attempt to determine whether the state courts have further defined the vague terms and, if they have done so, whether those definitions are constitutionally sufficient, *i.e.*, whether they provide some guidance to the sentencer." *Bell* v. *Cone*, 543 U.S. 447, 453 (2005) (per curiam) (quoting *Walton* v. *Arizona*, 497 U.S. 639, 654 (1990)) (emphasis omitted). The Court, in other words, does not void the statutory factor on its face before determining whether state courts have provided an authoritative clarifying construction.

No principled basis exists to treat the Guidelines differently from municipal ordinances, agency regulations, or capital-sentencing factors in this respect. As in those contexts, if an otherwise vague guideline has been authoritatively clarified, none of the constitutional harms that the vagueness doctrine seeks to avert will occur.

* * * * *

Petitioner was not deprived for the Constitution's guarantee of due process when he was deemed a career offender based on the unequivocal text of the official commentary. He therefore is not entitled to be resentenced.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived or life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. United States Sentencing Guidelines § 4B1.1 (2006) provides:

Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career of-

fender's criminal history category in every case under this subsection shall be Category VI.

Offense Statutory Maximum		Offense Level*
(A)	Life	37
(B)	25 years or more	34
(C)	20 years or more, but less than 25 years	32
(D)	15 years or more, but less than 20 years	29
(E)	10 years or more, but less than 15 years	24
(F)	5 years or more, but less than 10 years	17
(G)	More than 1 year, but less than 5 years	12

*If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

(c) If the defendant is convicted of 18 U.S.C. § 924(c) or § 929(a), and the defendant is determined to be a career offender under subsection (a), the applicable guideline range shall be determined as follows:

(1) If the only count of conviction is 18 U.S.C. § 924(c) or § 929(a), the applicable guideline range shall be determined using the table in subsection (c)(3).

(2) In the case of multiple counts of conviction in which at least one of the counts is a conviction other than a conviction for 18 U.S.C. § 924(c) or § 929(a), the guideline range shall be the greater of—

(A) the guideline range that results by adding the mandatory minimum

consecutive penalty required by the 18 U.S.C. § 924(c) or § 929(a) count(s) to the minimum and the maximum of the otherwise applicable guideline range determined for the count(s) of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count(s); and

(B) the guideline range determined using the table in subsection (c)(3).

(3) Career Offender Table for 18 U.S.C. § 924(c) or § 929(a) Offenders

§ 3E1.1 Reduction	Guideline Range for the 18 U.S.C. § 924(c) or § 929(a) Count(s)
No reduction	360-life
2-level reduction	292-365
3-level reduction	262-327.

3. United States Sentencing Guidelines § 4B1.2 (2006) provides:

Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise in-

volves conduct that presents a serious potential risk of physical injury to another.

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

Commentary

Application Notes:

1. For purposes of this guideline—

"Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses. "Crime of violence" includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included as "crimes of violence" if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.

"Crime of violence" does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a). Where the instant offense of conviction is the unlawful possession of a firearm by a felon, § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant had one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), § 4B1.4 (Armed Career Criminal) will apply.

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21

U.S.C. § 841(d)(1)) is a "controlled substance offense."

Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a "crime of violence".

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" or a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a "controlled substance offense." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the two prior convictions will be treated as related cases under § 4A1.2 (Defini-

tions and Instructions for Computing Criminal History).)

"Prior felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

2. *Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of § 4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry.*

3. *The provisions of § 4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under § 4B1.1.*

4. United States Sentencing Guidelines § 4B1.2 provides:

Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of vio-

lence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

Commentary

Application Notes:

1. *Definitions.—For purposes of this guideline—*

"Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

"Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

"Extortion" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" of a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a "controlled substance offense". (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under § 4A1.2 (Definitions and Instruction for Computing Criminal History).)

"Prior felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

2. *Offense of Conviction as Focus of Inquiry.—Section 4B1.1 (Career Offender) expressly provides that the instant and prior offense must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of § 4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry.*

3. *Applicability of § 4A1.2.—The provisions of § 4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under § 4B1.1.*

4. *Upward Departure for Burglary Involving Violence. —There may be cases in which a burglary involves violence, but does not qualify as a*

"crime of violence" as defined in § 4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a "crime of violence." In such a case, an upward departure may be appropriate.

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In The Supreme Court of the United States

TRAVIS BECKLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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I. THE RESIDUAL CLAUSE IN U.S.S.G. § 4B1.2(a)(2) IS VOID FOR VAGUENESS

Court-appointed amicus does not dispute that U.S.S.G. § 4B1.2(a)(2)'s residual clause is vague following *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015). Rather, he unpersuasively argues that the Guidelines are wholly immune from the Due Process Clause's prohibition on vagueness.

1. Amicus' "major premise" (Br. 19) is that indeterminate non-capital sentencing is constitutional. Although the Guidelines are not constitutionally required, it does not follow that they are immune from the Constitution once implemented. This Court has rejected that dangerous reasoning in other contexts. *See, e.g.*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (procedural due process); *Carter v. Jury Comm'n of Greene Cnty.*, 396 U.S. 320, 330 (1970) (grand and petit juries); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (appellate review). Accepting it here "would permit the Commission to promulgate Guidelines that discriminated on the basis of a protected class, penalized the exercise of constitutional rights, or bore no rational relationship to the goals of sentencing." *United States v. Pawlak*, 822 F.3d 902, 909 (6th Cir. 2016) (citation omitted).

Furthermore, amicus overlooks that even wholly discretionary sentencing in the pre-Guidelines era was "not . . . immune from scrutiny under the due-process clause." *Williams v. New York*, 337 U.S. 241, 252 n.18 (1949). Due process has always prohibited sentencing

based not on informed discretion, but rather on a "materially false" foundation, *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *see United States v. Tucker*, 404 U.S. 443, 447-48 (1972), or an "arbitrary distinction," *Chapman v. United States*, 500 U.S. 453, 464-65 (1991). Imposing a sentence based on a provision utterly devoid of meaning contravenes that constitutional proscription.

2. Amicus argues (Br. 15, 20-22, 27) that the Guidelines are immune from vagueness because they do not "regulate private conduct." But amicus cites no case in which the Court has ever immunized a legal provision from the prohibition on vagueness, let alone on the amorphous basis he proposes. To the contrary, "[v]ague laws in any area suffer a constitutional infirmity," *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966), including "vague sentencing provisions," *United States v. Batchelder*, 442 U.S. 114, 123 (1979). Consistent with the text of the Due Process Clause, the Court has liberally invoked the doctrine to scrutinize provisions, however labeled, that "depriv[e] . . . [a] defendant of his liberty." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966); *see Jordan v. De George*, 341 U.S. 223, 230-31 (1951).

As both "the framework for sentencing" and "*in a real sense the basis for the sentence*," the Guidelines effectuate such a deprivation. *Peugh v. United States*, 569 U.S. ___, 133 S. Ct. 2072, 2083 (2013) (citation omitted) (emphasis in original). Although amicus criticizes the Court's sentencing precedents following *United States v. Booker*, 543 U.S. 220 (2005) (Br. 20-22,

31 n.10), they have cemented the Guidelines as the single most important determinant of a defendant's sentence. *See Peugh*, 133 S. Ct. at 2083-85; *Molina-Martinez v. United States*, 578 U.S. ___, 136 S. Ct. 1338, 1345-46, 1349 (2016). Uniquely immunizing them from the fundamental prohibition on vagueness would shackle due process and turn a blind eye to the realities of sentencing.

Amicus' contrary argument (Br. 28-30), stripped to its essence, is that the Guidelines merely guide a sentencing court's discretion and lack binding legal effect. *Peugh*, however, squarely rejected that identical argument vis-à-vis the Ex Post Facto Clause, which, unlike the Due Process Clause, contemplates a "law." *Peugh*, 133 S. Ct. at 2085-88. Ignoring that dispositive aspect of *Peugh*, amicus seeks to distinguish the ex post facto doctrine as concerned with legislative targeting of disfavored groups (Br. 6, 9, 28-30). Yet vague provisions facilitate the very same evil by the Judiciary and Executive, "furnish[ing] a convenient tool for harsh and discriminatory enforcement . . . against particular groups deemed to merit [officials'] displeasure." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (citation omitted); *see Johnson*, 135 S. Ct. at 2257 (condemning "arbitrary enforcement by judges"). Amicus' failed attempt to distinguish *Peugh* thus confirms what this Court has long recognized: the two doctrines are constitutional kin. *See* Pet. Br. 25-27 & n.6.[1]

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[1] For the same reasons, *Peugh* also forecloses amicus' assertion (Br. 8-9, 12-13, 32-33) that subjecting the Guidelines to

3. The only post-*Booker* precedent upon which amicus relies (Br. 7-8, 12, 24-27), rather than criticizes, is *Irizarry v. United States*, 553 U.S. 708 (2008). *Irizarry* unremarkably held only that, after *Booker*, defendants lack a due-process expectation of a sentence within the guideline range, and thus need not be notified that a court may vary from that range. 553 U.S. at 713-14. Amicus contends that it follows therefrom that a defendant has no due-process right to notice of the guideline range *at all*. But that again reprises an argument unsuccessfully advanced by the government in *Peugh*. Brief for the United States 11, 41, *Peugh*, 133 S. Ct. 2072 (2013) (No. 12-62), 2013 WL 315237. Furthermore, *Irizarry* did not confront the vice of arbitrary enforcement with which vagueness and *Johnson* are principally concerned. *See Peugh*, 133 S. Ct. at 2085 (plurality); *United States v. Hurlburt*, 835 F.3d 715, 724 (7th Cir. 2016) (en banc). Because courts are legally required to calculate the guideline range and use it as the basis for sentencing, *Peugh*, 133 S. Ct. at 2083, due process requires that the Guidelines be intelligible.

4. Amicus speculates that subjecting § 4B1.2(a)(2) to vagueness would jeopardize other guidelines (Br. 31-32). But *Johnson* carefully limited its holding to provisions combining the "serious potential risk" standard with the "idealized ordinary case" analysis. 135 S. Ct. at 2561. Section 4B1.2(a)(2)'s residual clause is the only guideline with that combination in its text; all others analyze "real-world" conduct. *See Hurlburt*, 835

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vagueness would jeopardize the *Booker* remedy. *See* 133 S. Ct. at 2087-88.

F.3d at 724-25. The same is true of the 18 U.S.C. § 3553(a) factors, which, unlike § 4B1.2(a)(2), do not require an objective legal determination. Revealingly, amicus does not identify a single post-*Johnson* case where the text of any other guideline or § 3553(a) factor has even been challenged as unconstitutionally vague.

Furthermore, amicus conflates the role of the Commission with that of the Judiciary by asserting that vagueness challenges to the Guidelines "threaten[] the work of the Commission" (Br. 33). The Commission is a "policymaking" body, "not a court." *Booker*, 543 U.S. at 243 (citation omitted). As a result, it may amend the Guidelines as a "matter of policy," as it did following *Johnson*. 81 Fed. Reg. 4741, 4743 (Jan. 27, 2016). But the Commission is not charged with interpreting the Constitution. And, like other agencies, its policymaking duties cannot shield its regulations from constitutional examination by the Judiciary. *See* Pet. Br. 23-24.

Likewise, it is for the Court to decide, as a "constitutional matter," the retroactivity of new rules of constitutional law. *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 729 (2016). Despite amicus' impertinent suggestion (Br. 5, 11, 33-35), the Commission's decision not to make a guideline amendment retroactive on policy grounds cannot usurp the Judiciary's constitutional role. Regardless, the Commission declined to make its recent amendment to § 4B1.2(a) retroactive not because it deemed that course unwise as a policy matter, as amicus inaccurately states (Br. 34 & n.12),

but because "major data limitations" rendered "impossible" a "meaningful and complete retroactivity analysis." Hon. Patti B. Saris, Chair, U.S. Sent'g Comm'n, Remarks for Public Meeting 4 (Jan. 8, 2016).[2]

The Guidelines are not immune from the due-process prohibition on vagueness. Accordingly, § 4B1.2(a)(2)'s residual clause is void for vagueness.

II. RETROACTIVITY POSES NO BAR TO RELIEF

1. The government acknowledges (Br. 29) that the substantive rule in *Johnson* has retroactive effect "to all defendants on collateral review." *See Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257, 1268 (2016) (*Johnson* has "retroactive effect in cases on collateral review"). That includes Petitioner. Nonetheless, the government asserts (Br. 15, 18, 28), without supporting authority, that the relevant rule for retroactivity purposes is not the one announced in *Johnson*, *see* Pet. Br. 14 (articulating rule), but rather the rule Petitioner purportedly "seeks" – *i.e.*, that § 4B1.2(a)(2)'s residual clause and its commentary are void. The government's effort to re-characterize the rule is incompatible with the Court's jurisprudence since *Teague v. Lane*, 489 U.S. 288 (1989).[3]

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[2] http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160108/remarks.pdf.

[3] Notwithstanding the government's discussion (Br. 29-31), Justice Harlan's pre-*Teague* opinions in *Mackey v. United States*, 401 U.S. 667 (1971), and *United States v. U.S. Coin & Currency*,

Where, as here, a prisoner seeks collateral relief based upon "a case decided after [his] conviction and sentence became final," a federal court must "answer an initial question, and in some cases a second." *Stringer v. Black*, 503 U.S. 222, 227-28 (1992). "First," the court must "determine[] whether the decision relied upon announced a new rule," because the rule was not "dictated by precedent existing at the time the judgment in question became final." *Id.* at 227-28. "If, however, the decision did *not* announce a new rule, it is necessary to inquire whether granting the relief sought would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent." *Id.* (emphasis added). This second step is necessary in the latter scenario because "[t]he interests in finality, predictability, and comity underlying our new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent." *Id.*

Here, the analysis ends at *Stringer*'s first step. Petitioner relies on the rule announced in *Johnson* after

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401 U.S. 715 (1971), do not support the proposition that one rule may have retroactive effect in some collateral cases but not others. *Coin & Currency* arose on direct (not collateral) review, which, in Justice Harlan's view, "suffice[d] without more" to support retroactivity. 401 U.S. at 724 n.13. Indeed, the government does not dispute that affording *Johnson* retroactive effect to some collateral cases but not others would contravene *Teague*'s categorical approach, several statutory provisions codifying that approach, and *Welch*'s unqualified holding. *See* Pet. Br. 34-40.

his conviction became final. He concedes *Johnson*'s rule is "new" as to him. Thus, the underlying interests in finality and predictability are unquestionably implicated, rendering *Stringer*'s second step unnecessary. The only remaining issue is whether the new rule announced in *Johnson* satisfies a *Teague* exception. *Stringer*, 503 U.S. at 228. Because *Welch* held that *Johnson* announced a substantive rule, the retroactivity inquiry here is complete.

The government would nonetheless have the Court ask whether applying *Johnson*'s new rule to Petitioner's case would create *another* new rule that must separately satisfy one of *Teague*'s exceptions. It would thus require *Stringer*'s second step not only in cases where the petitioner relies on an old rule in a new context, but also those where the petitioner relies on a new rule from the outset. Doing so would not only contravene the plain language of *Stringer*, but conflict with this Court's retroactivity precedents.

Since *Teague*, the Court has only conducted *Stringer*'s second step in cases where the petitioner relied on a rule that was not already new.[4] The Court has never asked whether applying a *new* rule to a petitioner would create a *second* new rule. Rather, in every

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[4] *See Gray v. Netherland*, 518 U.S. 152, 158, 167-70 (1996); *Caspari v. Bohlen*, 510 U.S. 383, 390-97 (1994); *Graham v. Collins*, 506 U.S. 461, 467-78 (1993); *Saffle v. Parks*, 494 U.S. 484, 488-95 (1990); *Penry v. Lynaugh*, 492 U.S. 302, 314-19 (1989); *Teague*, 489 U.S. at 299, 301, 311.

case where the petitioner relied on a decision announcing a new rule, the Court has simply asked whether that rule satisfied a *Teague* exception.[5]

The Court's most recent retroactivity decisions confirm that *Stringer*'s second step is inapplicable where, as here, the petitioner relies on a new rule rather than seeks to extend an old one. In both *Welch* and *Montgomery*, the petitioner relied on a new rule, and the Court declared the rule substantive. In each case, however, the Court expressly declined to opine on the new rule's application to the petitioner's case. *See Welch*, 136 S. Ct. at 1268; *Montgomery*, 136 S. Ct. at 736. And it therefore did not inquire whether applying the new rule to the petitioner would have created a second new rule. Yet the Court would have been required to conduct that inquiry if the government's approach here were correct. *See also Sawyer*, 497 U.S. at 233-34 (declaring it unnecessary to address whether application of a new rule to petitioner "would itself involve a new rule of law").

Adopting the government's approach would not only be unprecedented, but would "destabilize" and unnecessarily complicate the "established retroactivity

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[5] *See Welch*, 136 S. Ct. at 1263-65, 1268; *Montgomery*, 136 S. Ct. 725-26, 732-37; *Chaidez v. United States*, 568 U.S. ___, 133 S. Ct. 1103, 1107 & n.3 (2013); *Whorton v. Bockting*, 549 U.S. 406, 416-17 (2007); *Beard v. Banks*, 542 U.S. 406, 410 (2004); *Schriro v. Summerlin*, 542 U.S. 348, 351-53 (2004); *O'Dell v. Netherland*, 521 U.S. 151, 159-68 (1997); *Lambrix v. Singletary*, 520 U.S. 518, 526-39 (1997); *Gilmore v. Taylor*, 508 U.S. 333, 338-46 (1993); *Sawyer v. Smith*, 497 U.S. 227, 229, 232-42 (1990); *Butler v. McKellar*, 494 U.S. 407, 408-09, 414-16 (1990).

framework." U.S. Br. 33. Determining the retroactive effect of a new rule would no longer involve a bright-line inquiry focused on a rule of law. It would instead turn on the infinitely-variable circumstances of each particular case. The slightest difference between a decision announcing a new rule and a petitioner's case would require a new, additional layer of analysis. That would render this Court's retroactivity precedents good for one case only and enmesh lower courts in endless retroactivity litigation.

Accordingly, the Court should decline the government's unsupported invitation to inquire whether applying *Johnson*'s new rule to Petitioner's case would create a second new rule. Of course, Petitioner must establish that *Johnson* renders § 4B1.2(a)(2)'s residual clause void in order to obtain the sentencing relief he seeks. *See* Pet. Br. 37-38. But because he relies upon *Johnson*'s new rule, the only question relevant to the threshold retroactivity inquiry is whether that rule falls within a *Teague* exception. *Welch* answered that question affirmatively. Therefore, the substantive rule in *Johnson* has retroactive effect. It is part of the body of law "available to petitioner as a ground upon which he may seek relief." *Sawyer*, 497 U.S. at 234.

2. Regardless, even if the relevant rule here is *Johnson*'s invalidation of § 4B1.2(a)(2)'s residual clause, that rule, too, is substantive.

Johnson announced a substantive rule because it has "a substantive function" – that is, it "changed the substantive reach of the Armed Career Criminal Act,"

18 U.S.C. § 924(e) ("ACCA"), "rather than the judicial procedures by which [it] is applied," *Welch*, 136 S. Ct. at 1265-66. "Before *Johnson*, the Act applied to any person who possessed a firearm after three violent felony convictions, even if one or more of those convictions fell under only the residual clause." *Id.* at 1265. "After *Johnson*, the same person engaging in the same conduct is no longer subject to the Act." *Id.* As a result, *Johnson* "alter[ed] the range of conduct or the class of persons that the [Act] punish[ed]." *Id.* at 1264-65 (citation omitted).

Johnson's invalidation of § 4B1.2(a)(2)'s residual clause likewise "change[s] the substantive reach" of the career-offender guideline. *Id.* at 1265. Before *Johnson*, defendants with three convictions for a "crime of violence" qualified as career offenders, "even if one or more of those convictions fell under only the residual clause." *Id.* "After *Johnson*, the same person engaging in the same conduct is no longer subject to" the enhancement. *Id.* Accordingly, the rule "alters the range of conduct or the class of persons that the [guideline] punishes," "rather than the judicial procedures by which [it] is applied." *Id.* at 1264-65 (citation omitted). It is therefore a substantive rule. *See* Pet. Br. 16-17, 41-46.

Ignoring that argument, the government focuses instead on the rule's "practical effect" and "operation" (Br. 11-12, 20, 23-24, 27). But that only confirms its substantive function. The Court has expressly recognized that increasing an advisory guideline range "create[s] a significant risk of a higher sentence." *Peugh*,

133 S. Ct. at 2088 (citation omitted); *see id.* at 2084 (citing "considerable empirical evidence" to that effect); *Molina-Martinez*, 136 S. Ct. at 1345-46, 1349 (same). The government (Br. 31, 44, 46) therefore acknowledges that, "as a practical reality, the Guidelines exert a significant effect on the sentences actually imposed in most cases." And the effect of the career-offender guideline is clear. In 2014, the average non-career-offender sentence was less than half of – and nearly seven years shorter than – the average sentence imposed on career offenders. Fed. Pub. & Cmty. Def. & NAFD ("Defenders") Amicus Br. 6, 2a.

The effect of § 4B1.2(a)(2)'s residual clause in particular is striking. Post-*Johnson* re-sentencings illustrate that point. Comprehensively compiled in the attached chart is every case known to Petitioner involving a defendant who: (1) had her guideline range enhanced pre-*Johnson* under § 4B1.2(a)(2)'s residual clause; (2) obtained relief under *Johnson*; and (3) has since been re-sentenced without the enhancement. App. 1-14. Of the 88 total cases identified, every defendant but one received a sentence lower than the sentence originally imposed, even though the government urged re-imposition of the same (or higher) sentence in approximately one-quarter of the cases. Moreover, the average post-*Johnson* sentence imposed was more than 3 years lower than the original sentence. And, in many cases, it was substantially lower, including in one case by 17½ years. *Id.* at 4. Thus, contrary to the government's argument (Br. 12, 15-16, 28-29), the rule here does far more than merely reduce the

guideline range; it effectively reduces the sentence itself, often substantially. That cannot be a procedural function.

Unable to dispute the rule's compelling impact, the government argues (Br. 31-32) that this impact is "not relevant to the retroactivity analysis." It asserts that this Court has previously deemed "procedural" rules that "undoubtedly" affected the outcome. To the contrary, the effect of the rules it cites could *not* be demonstrated. *See, e.g.*, *Whorton*, 549 U.S. at 418-20 (discussing uncertain effect of *Crawford v. Washington*, 541 U.S. 36 (2004)). Here, by contrast, the rule's impact is incontrovertible. And that impact reflects its substantive function: by narrowing the scope of a sentencing enhancement, the rule alters the range of conduct and class of persons punished. It therefore comfortably satisfies the "normal criteria for a substantive rule." *Welch*, 136 S. Ct. at 1267.

Resisting that "normal criteria," the government invents its own. It suggests (Br. 12-13) that a rule is substantive only if it renders a defendant ineligible for the same sentence. *Montgomery* and *Welch*, however, refute that formulation. The Court acknowledged that Montgomery remained eligible for the same life-without-parole sentence regardless of the new, substantive rule in *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012), if the court found him permanently incorrigible. 136 S. Ct. at 734-37. And the Court similarly acknowledged that Welch remained "eligible for [the same] 15-year sentence regardless of *Johnson*" if

his robbery offense qualified as an ACCA predicate under the elements clause. 136 S. Ct. at 1268.

The government next insists (Br. 12, 20, 24, 27-28, 31) that the rule here is procedural because it does not change the statutory range and therefore does not "delimit the bounds of a lawful sentence." If, however, altering statutory boundaries were a *sine qua non* of substantive sentencing rules, then the Court would have resolved *Welch* on that basis. But *Welch* declined to adopt that formulation, despite the government's urging. *See* Reply Brief for the United States 2, 9 & n.3, 12, 18, *Welch*, 136 S. Ct. 1257 (2016) (No. 15-6418), 2016 WL 1165972. And that was for good reason. The "bounds of a lawful [federal] sentence" are delimited not only by the statutory range, but also by the sentencing structure established by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 ("SRA"), and *Booker* and its progeny. That structure "impose[s] a series of requirements on sentencing courts that cabin the exercise of [their] discretion." *Peugh*, 133 S. Ct. at 2084.

In light of those requirements, it will be the rare case where a court can lawfully impose a sentence in the career-offender range if *Johnson* renders the defendant ineligible for that enhancement. The non-enhanced range incorporates the Commission's data and expertise, "reflect[ing] a rough approximation" of sentences that, in the "typical case," achieve the sentencing objectives mandated by Congress and codified in § 3553(a). *Rita v. United States*, 551 U.S. 338, 348-50, 357 (2007). In contrast, the Commission has found that the career-offender guideline range

generally does *not* reflect those objectives. *See* Defenders Amicus Br. 27-28. Instead, it implements the congressional mandate in 28 U.S.C. § 994(h), which is tied to the statutory maximum. That distinction explains the high rate of downward variances from the career-offender range. *Id.* at 2a.

Furthermore, because the career-offender enhancement substantially increases the guideline range in most cases, an upward variance to the enhanced range would require a "sufficiently compelling" and "significant justification," *Gall v. United States*, 552 U.S. 38, 50 (2007), "stated with specificity," 18 U.S.C. § 3553(c)(2). Such a justification, however, will rarely exist. Indeed, in the 88 post-*Johnson* re-sentencings collected by Petitioner, not a single defendant received a sentence as high as the low end of the original, enhanced range. *See* App. 1-14. This is not a fluke. In 2014, just 1.2% of non-career offenders received a sentence as high as the guideline minimum for career offenders convicted of the same type of offense. Defenders Amicus Br. 6-7, 6a-8a. In short, courts can rarely impose a career-offender sentence on someone who is not a career offender.

Petitioner's case exemplifies this dynamic. Section 4B1.2(a)(2)'s residual clause increased his guideline range from 262-to-327 months to 360-months-to-life. The district court acknowledged that, absent that enhancement, it would have been required to give him a lower sentence. JA 149. It explained that, "although the imposed 360-month sentence does not exceed the statutory maximum, such a sentence could only be

re-imposed under the SRA if the Court had a separate reason that could justify departing upward from the correct range." *Id.* Unsurprisingly, no such justification existed. Varying upward to re-impose a career-offender sentence would be "invalid," the court determined, because it would represent "a clear error of judgment . . . in weighing the Section 3553 factors." *Id.* (citation and footnote omitted). *See also United States v. Martinez*, 821 F.3d 984, 989-90 (8th Cir. 2016) (declaring "unsupported by the law" alternative sentence varying upward to non-applicable career-offender range); App. 5 (reflecting that, following *Johnson* re-sentencing on remand, Martinez received a sentence well below the career-offender range).

Therefore, *Johnson* does indeed affect the "bounds of a lawful sentence" for defendants whose sentences depended on § 4B1.2(a)(2)'s residual clause. Courts could have lawfully imposed a sentence within the career-offender range before *Johnson*, but after *Johnson* they will be unable to do so except in the rare case. In that regard, this case is analogous to *Montgomery*. Just as re-sentencing courts post-*Miller v. Alabama* can impose a sentence of life without parole only in the "rare" case where they find "permanent incorrigibility," *Montgomery*, 136 S. Ct. at 734, re-sentencing courts post-*Johnson* can impose a career-offender sentence only in the rare case where they can justify an upward variance from a guideline range typically reflecting an appropriate sentence to one that almost never does. The rule therefore "necessarily carries a significant risk that a defendant . . . faces a punishment that the

law cannot impose upon him." *Id.* at 734 (citation omitted). *Montgomery* thus confirms its substantive nature.

So too does *Miller v. Florida*, 482 U.S. 423 (1987). In unanimously holding that a retrospective increase to a presumptive sentencing guideline range violated the Ex Post Facto Clause, the Court concluded that the increase was substantive, not procedural. It reasoned that increasing the defendant's offense level "in no [way] alter[ed] the method to be followed in determining the appropriate sentence; it simply insert[ed] a larger number into the same equation," which "increas[ed] the quantum of punishment" and "directly and adversely affect[ed] the sentence." *Id.* at 433-35 (citation omitted). This Court has similarly characterized the federal Guidelines as a "substantive formula." *Peugh*, 133 S. Ct. at 2088 (citation omitted). Moreover, *Miller* rejected the argument that the guidelines there were not substantive because they "operate[d] only as a 'procedural guidepost' for the exercise of discretion within the same statutorily imposed sentencing limits." 482 U.S. at 434-35; *see id.* at 428. Given that the government advances a nearly identical argument here, *Miller* is highly instructive. *Cf. Peugh*, 133 S. Ct. at 2082-84 (relying heavily on *Miller*).

Disregarding the similarities with *Welch*, *Montgomery*, and *Miller v. Florida*, the government relies on *Lambrix* (Br. 12, 24-26), which deemed procedural *Espinosa v. Florida*, 505 U.S. 1079 (1992). But *Espinosa* is not analogous to the rule here. The government mischaracterizes *Espinosa*'s rule as prohibiting a capital

sentencer from considering a vague aggravating circumstance. That rule, however, was established in earlier decisions, and *Espinosa* took it as a "given." *Lambrix*, 520 U.S. at 528 n.3; *see Espinosa*, 505 U.S. at 1081. Instead, *Espinosa* considered whether a Florida trial judge's review of a capital jury's sentencing recommendation could "cure" the jury's consideration of a vague aggravator in the same way appellate review does. *See Lambrix*, 520 U.S. at 526, 530-31, 533-38. It answered that question negatively, concluding that the judge and jury were effectively "co-sentencers." *Id.* at 528, 533; *see Espinosa*, 505 U.S. at 1081-82. Thus, contrary to the government's characterization (Br. 24), the rule in *Espinosa* did not involve "what considerations a judge or jury may or may not take into account in imposing sentence." Rather, it "allocate[d] decisionmaking authority between judge and jury" and was therefore procedural. *Welch*, 136 S. Ct. at 1265 (citation omitted).

Equally unhelpful is the government's in-passing reliance on *Saffle* and *Beard* (Br. 26). The rule in *Saffle* related to "how" a capital jury could consider mitigating evidence (*i.e.*, without sympathy), and therefore governed "the manner" of sentencing, 494 U.S. at 490-91, a procedural function, *Schriro*, 542 U.S. at 353. So too did the rule in *Beard* – prohibiting any requirement that capital juries disregard mitigating factors not found unanimously – because it merely "govern[ed] how the sentencer considers evidence." 542 U.S. at 415-16. Unlike the rule here, neither rule narrowed the range of conduct or class of persons punished, changed

the bounds of lawful sentences, or altered the substantive formula of sentencing.

Lacking supporting precedent, the government (Br. 33-37) resorts to a hyperbolic account of the potential costs of retroactive application. But, as the government itself recently recognized, these matters have no legal relevance. *See Welch*, U.S. Reply Br. 19; Brief for the United States as Amicus Curiae 22-23, *Montgomery*, 136 S. Ct. 718 (2016) (No. 14-280), 2015 WL 4607689. Put simply, "the retroactive application of substantive rules does not implicate . . . interests in ensuring the finality of convictions and sentences." *Montgomery*, 136 S. Ct. at 732. The Court should decline the government's invitation to conduct a freewheeling cost-benefit analysis that would transform the Court into a legislature and revive the failed regime of *Linkletter v. Walker*, 381 U.S. 618 (1965).

In sum, whether the new rule is *Johnson* or its invalidation of § 4B1.2(a)(2)'s residual clause, that rule is substantive and therefore has retroactive effect here.

III. PETITIONER'S SENTENCE VIOLATED DUE PROCESS

1. The government does not dispute that Petitioner's sentence violated due process if the former commentary listing his firearms offense depended on § 4B1.2(a)(2)'s residual clause. Nor does it dispute that the residual clause is the only definition of "crime of violence" in the text of § 4B1.2(a) that this commentary could have interpreted. With the residual clause now

void for vagueness, the government is thus forced to assert (Br. 50-53 & n.6) that the commentary set forth a definition of the term "crime of violence" that was "in addition to," and "independent[] of," the definitions set forth in § 4B1.2(a)'s text. However, on that understanding, the commentary would be "inconsistent" with the text and therefore invalid under *Stinson v. United States*, 508 U.S. 36, 38, 45 (1993).

That is so because former § 4B1.2(a)'s text set forth three exclusive definitions of the term "crime of violence." It stated, "[t]he term 'crime of violence' *means* any offense" that: 1) falls within the elements clause in § 4B1.2(a)(1); 2) is an offense enumerated in § 4B1.2(a)(2); or 3) satisfies the residual clause (emphasis added). By using the word "means" rather than "includes," the text excluded any other definitions of the term "crime of violence." *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. ___, 132 S. Ct. 2156, 2170 (2012); *Burgess v. United States*, 553 U.S. 124, 130 (2008).[6] Therefore, if the commentary was not interpreting one of these three exclusive definitions, "then it [wa]s in effect *adding to* the definition. And that's *necessarily* inconsistent with the text of the guideline itself." *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (en banc) (unanimous); *accord United States v. Soto-Rivera*, 811 F.3d 53, 59-62 (1st Cir. 2016);

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[6] Notably, the Commission has used the word "includes" in the text of other guidelines. *See, e.g.*, U.S.S.G. §§ 4A1.1(d), 5E1.2(d), 5G1.3(a), 5H1.4, 6A1.2(b).

United States v. Bell, ___ F.3d ___, 2016 WL 6311084, at *3-4 (8th Cir. Oct. 28, 2016).

Accepting the government's view, then, would mean that the Commission flouted *Stinson* by including an additional, independent definition of "crime of violence" in the commentary. That is implausible. Almost immediately after *Stinson*, the Commission recognized that its commentary must interpret or explain a guideline's text. U.S.S.G. app. C, amend. 498 (1993). And when the Commission amended § 4B1.2(a)'s commentary over a decade later to include Petitioner's firearms offense, it expressly relied on judicial decisions interpreting the residual clause. U.S.S.G. app. C, amend. 674 (2004) (Reason for Amendment). The Court should presume that, by expressly connecting the commentary to that textual definition, the Commission sought to abide by *Stinson*'s established holding.

In any event, whatever the Commission's intent, the commentary was legally valid under *Stinson* – and thus capable of increasing Petitioner's sentence – only as an interpretation of § 4B1.2(a)(2)'s residual clause. Under the SRA, the Guidelines are promulgated pursuant to "an express congressional delegation for rulemaking," *Stinson*, 508 U.S. at 44, *see* 28 U.S.C. § 994(x), and must be approved by Congress, 28 U.S.C. § 994(p), so as to ensure that "the Commission is fully accountable to Congress," *Mistretta v. United States*, 488 U.S. 361, 393 (1989). The commentary, by contrast, is neither subject to notice-and-comment rulemaking nor "reviewed by Congress." *Stinson*, 508 U.S. at 46. It is for that reason that the commentary is valid only if it

"interprets" or "explains" a guideline's text. *See id.* at 44-46. Affording the commentary legal force independent of the text would conflict with the SRA, permit the Commission to make law without oversight, and remove structural safeguards ensuring the Commission's compliance with the separation of powers. *Mistretta*, 488 U.S. at 393-94.

Consequently, the commentary's validity depended on § 4B1.2(a)(2)'s vague residual clause. Relying on the commentary to enhance Petitioner's sentence therefore violated due process.

2. The government alternatively argues (Br. 55-57) that, even if the commentary depended on § 4B1.2(a)(2)'s residual clause, that clause is not vague "as applied" to Petitioner because the commentary identified his offense. *Johnson*, however, jettisoned that as-applied analysis over the strenuous objections of the government and dissent. 135 S. Ct. at 2560-61; *see id.* at 2580-82 (Alito, J., dissenting); Supplemental Brief for the United States 11, 15-16, 18-19, 38, *Johnson*, 135 S. Ct. 2551 (2015) (No. 13-7120), 2015 WL 1284964. The Court explained: "although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson*, 135 S. Ct. at 2560-61. Accordingly, the Court invalidated the ACCA's residual clause "in all its applications." *Id.* at 2561.

The government (Br. 14, 53-57) attempts to distinguish *Johnson* on the ground that, unlike § 4B1.2(a)(2), the ACCA's residual clause lacked an authoritative clarifying construction. But that overlooks this Court's four pre-*Johnson* decisions seeking to do just that. *See id.* at 2558-60. Like the commentary, those decisions expressly identified specific offenses satisfying the ACCA's residual clause (or not), absolving the public and lower courts from consulting the vague text in those instances. *E.g.*, *Sykes v. United States*, 564 U.S. 1 (2011) (Indiana vehicle flight); *James v. United States*, 550 U.S. 192 (2007) (Florida attempted burglary). Yet *Johnson* did not exempt these offenses from its facial holding. Despite the Court's best efforts, there was no construction of the residual clause capable of clarifying its meaning. Just as the ACCA's residual clause was impossible to interpret, so too is § 4B1.2(a)(2)'s identical residual clause.

Straying far from *Johnson*, the government cites *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), *Grayned v. City of Rockford*, 408 U.S. 104 (1972), and *Bell v. Cone*, 543 U.S. 447 (2005), to argue that the Court must first consider clarifying constructions before invalidating vague text on its face. However, each of those cases involved clarifying constructions of vague *state*-law provisions. Federal courts are conclusively bound in every instance by a state-court or state-agency's construction of state law. *See Hoffman Estates*, 455 U.S. at 494 n.5; *Cramp v. Bd. of Pub. Instruction of Orange Co., Fla.*, 368 U.S.

278, 279-80 (1961). This case, of course, involves only federal law.

Unaided by federalism, the government obliquely hints (Br. 56) that, just as the Court sometimes defers to agency interpretations, it should likewise "take account of" the Commission's interpretation of § 4B1.2(a)(2)'s residual clause. But even if traditional administrative-law principles applied with full force to the Commission, a dubious proposition given its *sui generis* status, no deference would be warranted here. That is so because the commentary was not interpreting the Commission's own words; rather, § 4B1.2(a)(2)'s residual clause merely "parrot[ed]" back the identical language of the ACCA, *Gonzales v. Oregon*, 546 U.S. 243, 256-58 (2006), a statute that Congress did not "entrust [the Commission] to administer," *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Furthermore, § 4B1.2(a)(2)'s residual clause is not ambiguous (*i.e.*, capable of multiple, ascertainable meanings). *See Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000). Rather, *Johnson* declared the residual clause so "hopeless[ly] indetermina[te]" that its meaning is impossible to ascertain. 135 S. Ct. at 2558. Because this Court could not derive meaning from this text, neither could the Commission. Indeed, when this Court determines a statute's unambiguous meaning (or, here, lack thereof), the Commission may not offer a contrary one. *See United States v. LaBonte*, 520 U.S. 751, 757-62 (1997).

That is particularly true here, because the Commission "did not take account of empirical data and national experience" when interpreting § 4B1.2(a)(2)'s residual clause to include Petitioner's firearms offense in the commentary. *Kimbrough v. United States*, 552 U.S. 85, 109 (2007) (citation omitted). Quite the contrary, it merely looked to lower-court opinions interpreting the residual clause and the National Firearms Act. U.S.S.G. app. C, amend. 674 (2004) (Reason for Amendment); *see* Pet. Br. 50. *Johnson* declared that sort of pure legal analysis impossible. And it did so when considering the same firearms offense at issue here, an offense for which "the residual clause yield[ed] no answers." *Johnson*, 135 S. Ct. at 2559.

Just as this Court could not save the ACCA's residual clause from facial invalidation, the Commission cannot save § 4B1.2(a)(2)'s identical, derivative text from that same fate. It too is void in its entirety.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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RE-SENTENCINGS AFTER *JOHNSON**

CAREER OFFENDER CASES (45)

1st Cir.	***United States v. Soto-Rivera***, 811 F.3d 53 (1st Cir. 2016) No. 3:13-cr-0463 (D.P.R.)	**Direct appeal**	**92-115 mos.**	**108 mos.**	**70-87 mos.**	**87 mos.**	**Lower by 21 mos.**
₸	*Stampley v. United States*, No. 1:11-cr-10302, 2016 WL 4727136 (D. Mass. Sept. 9, 2016)	§ 2255	151-188 mos.	60 mos.	24-30 mos.	30 mos.	Lower by 30 mos.
	United States v. Aponte, No. 11-cr-30018 (D. Mass. Sept. 22, 2016)	§ 2255	262-327 mos.	102 mos. (42 mos. + 60 mos.**)	75-81 mos. (15-21 mos. + 60 mos.)	75 mos. (15 mos. + 60 mos.)	Lower by 27 mos.
	United States v. Ramirez, No. 1:10-cr-10008, ___ F. Supp. 3d ___, 2016 WL 3014646 (D. Mass. May 24, 2016)	§ 2255	151-188 mos.	144 mos.	37-46 mos.	Time served (approx. 72 mos.)	Lower by 72 mos.

* This chart compiles every case known to Federal Defenders in which: (1) the defendant's applicable guideline range was previously enhanced based on a prior or instant conviction deemed a "crime of violence" under the residual clause in U.S.S.G. § 4B1.2(a)(2); (2) the defendant obtained relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015); and (3) the defendant has been re-sentenced as of October 28, 2016. Cases were identified by surveying all Federal Defender offices nationwide and by tracking references to *Johnson* in Westlaw and Lexis databases. When possible, case citations are to reported decisions; otherwise, cases are identified by the district court case name and criminal docket number. The date given refers to the date on which the appellate court or district court applied *Johnson* to the defendant's guideline sentence. In some circuits, there have been no re-sentencings due to circuit precedent, timing, and/or stays pending the outcome in this case. Information regarding the applicable guideline ranges and sentences imposed was obtained from written court decisions, sentencing transcripts, judgments and amended judgments, briefs, other court filings as available through PACER, and in some instances from defense counsel.

** Denotes a consecutive sentence for a conviction under 18 U.S.C. § 924(c).

₸ Denotes that, at re-sentencing, the government asked the court to re-impose the original sentence or higher.

Circuit	Case	Direct Appeal or § 2255	Career Offender Range	Original Sentence Imposed	Non-Career Offender Range	Sentence Imposed at Resentencing	Relationship to Original Sentence
	United States v. Vasquez, No. 4:12-cr-40010 (D. Mass. Sept. 26, 2016)	§ 2255	188-235 mos.	84 mos.	46-57 mos. (w/ 60 mo. stat. min.)	Time served (approx. 57 mos.)	Lower by 27 mos.
2d Cir.	*United States v. Snell*, No. 14-178 (2d Cir. Aug. 18, 2015) No. 5:11-cr-363 (N.D.N.Y.)	Direct appeal	210-262 mos. (w/ 240 mo. stat. max.)	210 mos.	100-125 mos.	120 mos.	Lower by 90 mos.
₮	*Petrillo v. United States*, 147 F. Supp. 3d 9 (D. Conn. 2015) (No. 3:05-cr-00312)	§ 2255	188-235 mos.	188 mos.	151-188 mos.	151 mos.	Lower by 37 mos.
₮	*United States v. Velasquez*, No. 08-cr-56 (E.D.N.Y. Aug. 4, 2016)	§ 2255	188-235 mos.	160 mos.	70-87 mos.	Time served (approx. 108 mos.)	Lower by 52 mos.
	Williams v. United States, No. 1:07-cr-00238 (W.D.N.Y. Apr. 18, 2016)	§ 2255	262-327 mos.	156 mos.	51-63 mos. (estimated)	Time served (approx. 114 mos.)	Lower by 42 mos.
3d Cir.	*United States v. Calabretta*, 831 F.3d 128 (3d Cir. 2016) No. 2:12-cr-00131 (D.N.J.)	Direct appeal	188-235 mos.	120 mos.	108-135 mos.	100 mos.	Lower by 20 mos.
	United States v. Gamble, No. 15-1760 (3d Cir. Dec. 31, 2015) No. 1:13-cr-00047 (M.D. Pa.)	Direct appeal	168-210 mos.	126 mos.	27-33 mos.	51 mos.	Lower by 75 mos.

	United States v. Nerius, No. 14-4121, 2015 U.S. App. LEXIS 23093 (3d Cir. Aug. 26, 2015) No. 4:13-cr-00171 (M.D. Pa.)	Direct appeal	37-46 mos.	37 mos.	30-37 mos.	36 mos.	Lower by 1 mo.
₮	*United States v. Townsend*, 638 F App'x 172 (3d Cir. 2015) No. 2:12-cr-125 (W.D. Pa.)	Direct appeal	360 mos.-life	200 mos.	135-168 mos.	200 mos.	Same
	United States v. Anker, No. 2:14-cr-00144, 2016 WL 4480054 (W.D. Pa. Aug. 25, 2016)	§ 2255	151-188 mos.	30 mos.	24-30 mos.	Time served (approx. 17 mos.)	Lower by 13 mos.
	United States v. Boone, No. 2:12-cr-00162, 2016 WL 3057655 (W.D. Pa. May 31, 2016)	§ 2255	151-188 mos.	120 mos.	30-37 mos.	Time served (approx. 27 mos.)	Lower by 93 mos.
	United States v. Dates, No. 2:06-cr-83 (W.D. Pa. Oct. 6, 2016)	§ 2255	262-327 mos.	151 mos.	84-105 mos.	84 mos.	Lower by 67 mos.
	United States v. Evans, No. 1:02-cr-01, 2015 WL 9480097 (W.D. Pa. Dec. 29, 2015)	§ 2255	188-235 mos.	205 mos.	57-71 mos.	Time served (approx. 153 mos.)	Lower by 52 mos.
	United States v. Joseph Mack, No. 2:10-cr-00233 (W.D. Pa. Aug. 29, 2016)	§ 2255	188-235 mos.	130 mos.	57-71 mos. (w/ 60 mo. stat. min.)	Time served (approx. 68 mos.)	Lower by 62 mos.

Circuit	Case	Direct Appeal or § 2255	Career Offender Range	Original Sentence Imposed	Non-Career Offender Range	Sentence Imposed at Resentencing	Relationship to Original Sentence
	United States v. McColley, No. 1:07-cr-45, 2016 WL 1156520 (W.D. Pa. Mar. 24, 2016)	§ 2255	77-96 mos.	84 mos.	30-37 mos.	36 mos. (effective)	Lower by 48 mos.
	United States v. Milligan, No. 2:11-cr-224 (W.D. Pa. Aug. 4, 2016)	§ 2255	262-327 mos.	110 mos.	120-150 mos.	Time served (approx. 63 mos.)	Lower by 47 mos.
	United States v. Erskine Smith, No. 2:92-cr-146 (W.D. Pa. Aug. 25, 2016)	§ 2255	360 mos.-life	360 mos.	135-168 mos.	150 mos.	Lower by 210 mos.
	United States v. Strickler, No. 2:11-cr-158 (W.D. Pa. Aug. 8, 2016)	§ 2255	151-188 mos.	87 mos.	37-46 mos.	Time served (approx. 51 mos.)	Lower by 36 mos.
5th Cir.	*United States v. Estrada*, No. 15-40264 (5th Cir. Oct. 27, 2015) No. 2:14-cr-681-1 (S.D. Tex.)	Direct appeal	188-235 mos.	188 mos.	77-96 mos.	120 mos.	Lower by 68 mos.
	United States v. Williams, No. 7:11-cr-0036 (W.D. Tex. Apr. 27, 2016)	§ 2255	151-188 mos.	151 mos.	24-30 mos. (estimated)	24 mos.	Lower by 127 mos.
6th Cir.	*United States v. Caldwell*, 650 F. App'x 257 (6th Cir. 2016) No. 1:14-cr-58 (N.D. Ohio)	Direct appeal	292-365 mos.	292 mos. (208 mos. + 84 mos.)	84-105 mos. + 84 mos.	244 mos. (160 mos. + 84 mos.)	Lower by 48 mos.

T	***United States v. Carpenter***, No. 15-3192 (6th Cir. Aug. 21, 2015) No. 1:14-cr-317 (N.D. Ohio)	Direct appeal	151-188 mos.	130 mos.	92-115 mos.	115 mos.	Lower by 15 mos.
	United States v. Darden, 605 F. App'x 545 (6th Cir. 2015) No. 6:11-cr-00036 (E.D. Ky.)	Direct appeal	151-188 mos.	144 mos.	110-137 mos.	120 mos.	Lower by 24 mos.
	United States v. Harbin, 610 F. App'x 562 (6th Cir. 2015) No. 5:14-cr-00074 (N.D. Ohio)	Direct appeal	188-235 mos.	110 mos.	21-27 mos.	27 mos.	Lower by 83 mos.
8th Cir.	*United States v. Martinez*, 821 F.3d 984 (8th Cir. 2016) No. 4:14-cr-3049 (D. Neb.)	Direct appeal	262-327 mos.	262 mos.	120-125 mos.	180 mos.	Lower by 82 mos.
	United States v. Taylor, 803 F.3d 931 (8th Cir. 2015) No. 4:13-cr-0142 (E.D. Ark.)	Direct appeal	37-46 mos.	37 mos.	27-33 mos.	18 mos.	Lower by 19 mos.
9th Cir.	*United States v. Colino*, No. 15-50102 (9th Cir. Nov. 16, 2015) No. 2:14-cr-359 (C.D. Cal.)	Direct appeal	188-235 mos.	112 mos.	70-87 mos.	70 mos.	Lower by 42 mos.

T	***United States v. Lee*, 821 F.3d 1124 (9th Cir. 2016)** **No. 3:09-cr-193 (N.D. Cal.)**	**Direct appeal**	**360 mos.-life**	**120 mos.**	**84-105 mos.**	**96 mos.**	**Lower by 24 mos.**
	United States v. Armstrong, No. 3:11-cr-290 (D. Or. Aug. 24, 2016)	§ 2255	151-188 mos.	120 mos.	57-71 mos.	Time served (approx. 60 mos.)	Lower by 60 mos.
	United States v. Dietrick, No. 2:11-cr-253 (W.D. Wash. Aug. 18, 2016)	§ 2255	92-115 mos.	92 mos.	33-41 mos.	Time served (approx. 55 mos.)	Lower by 37 mos.
	United States v. Gentry, __ F Supp. 3d. __, 2016 WL 3647331 (D. Or. July 7, 2016) No. 3:12-cr-604-SI (D. Or.)	§ 2255	188-235 mos.	120 mos.	120-150 mos.	70 mos.	Lower by 50 mos.
	United States v. Gibson, No. 3:98-cr-05426, 2016 WL 3349350 (W.D. Wash. June 15, 2016)	§ 2255	248-295 mos. (188-235 mos. + 60 mos.)	248 mos. (188 mos + 60 mos.)	137-156 mos. (77-96 mos. + 60 mos.)	Time served (approx. 210 mos.)	Lower by 38 mos.
	United States v. Hoopes, __ F Supp. 3d __, 2016 WL 3638114 (D. Or. July 5, 2016) No. 3:11-cr-425-HZ (D. Or.)	§ 2255	151-188 mos.	100 mos.	57-71 mos.	71 mos.	Lower by 29 mos.
	United States v. Jennings, No. 2:12-cr-292 (W.D. Wash. Aug. 17, 2016)	§ 2255	151-188 mos.	96 mos.	63-78 mos.	51 mos.	Lower by 45 mos.

Circuit	Case	Direct Appeal or § 2255	Career Offender Range	Original Sentence Imposed	Non-Career Offender Range	Sentence Imposed at Resentencing	Relationship to Original Sentence
	United States v. Rios, No. 2:11-cr-0197-RMP (E.D. Wash. June 24, 2016)	§ 2255	188-235 mos.	120 mos.	77-96 mos.	77 mos.	Lower by 43 mos.
	United States v. Stamps, No. 4:13-cr-238, 2016 WL 3747286 (N.D. Cal. June 29, 2016)	§ 2255	151-188 mos.	120 mos.	77-96 mos.	72 mos.	Lower by 48 mos.
	United States v. Teeples, No. 9:02-cr-45, 2016 WL 4147139 (D. Mont. Aug. 3, 2016)	§ 2255	188-235 mos.	211 mos.	78-97 mos.	87 mos.	Lower by 124 mos.
	United States v. West, No. 14-cr-0066 (E.D. Wash. July 22, 2016)	§ 2255	151-188 mos.	111 mos., 15 days	57-71 mos.	75 mos., 15 days	Lower by 36 mos.
10th Cir.	*United States v. Madrid*, 805 F.3d 1204 (10th Cir. 2015) No. 5:13-cr-03361 (D.N.M.)	Direct appeal	188-235 mos.	188 mos.	92-115 mos.	70 mos.	Lower by 118 mos.
	United States v. Smith, 628 F. App'x 565 (10th Cir. 2015) No. 1:14-cr-1136 (D.N.M.)	Direct appeal	188-235 mos.	120 mos.	63-78 mos.	63 mos.	Lower by 57 mos.
	United States v. Daugherty, No. 4:07-cr-0087, 2016 WL 4442801 (N.D. Okla. Aug. 22, 2016)	§ 2255	130-162 mos.	130 mos.	84-105 mos.	Time served (approx. 112 mos.)	Lower by 18 mos.

U.S.S.G. § 2K2.1 CASES (43)

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	Relationship to Original Sentence
1st Cir. ₸	*United States v. Fields*, 823 F.3d 20 (1st Cir. 2016) No. 1:13-cr-10097 (D. Mass.)	Direct appeal	70-87 mos.	60 mos.	37-46 mos.	Time served (approx. 46 mos.)	Lower by 14 mos.
	United States v. Pagán-Soto, No. 13-2243 (1st Cir. Aug. 27, 2015) No. 3:13-cr-223 (D.P.R.)	Direct appeal	70-87 mos.	96 mos.	24-30 mos.	36 mos.	Lower by 60 mos.
2d Cir. ₸	*United States v. Herring*, No. 14-3194 (2d Cir. Aug. 18, 2015) No. 1:13-cr-136 (D. Vt.)	Direct appeal	37-46 mos.	24 mos.	21-27 mos.	Time served (approx. 17 mos.)	Lower by 7 mos.
3d Cir.	*United States v. Mekail Jones*, No. 1:11-cr-42 (W.D. Pa. Oct. 14, 2016)	§ 2255	70-87 mos.	76 mos.	46-57 mos.	52 mos.	Lower by 24 mos.
6th Cir.	*United States v. Chin*, No. 15-5448 (6th Cir. Jan. 26, 2016) No. 1:13-cr-00091 (E.D. Tenn.)	Direct appeal	37-46 mos.	42 mos.	21-27 mos.	Time served (approx. 28 mos.)	Lower by 14 mos.
	United States v. Grayer, 625 F. App'x 313 (6th Cir. 2015) No. 1:13-cr-10051 (W.D. Tenn.)	Direct appeal	92-115 mos.	84 mos.	51-63 mos.	47 mos.	Lower by 37 mos.

∓	***United States v. Pawlak***, 822 F.3d 902 (6th Cir. 2016) No. 1:14-cr-0305 (N.D. Ohio)	**Direct appeal**	**121-151 mos.**	**105 mos.**	**84-105 mos.**	**71 mos.**	**Lower by 34 mos.**
8th Cir.	*United States v. Beck*, 2016 WL 3676191 (D. Neb. July 6, 2016) No. 8:13-cr-62 (D. Neb.)	§ 2255	110-120 mos.	110 mos.	77-96 mos.	77 mos.	Lower by 33 mos.
	United States v. Hawkins, No. 8:13-cr-00343, 2016 WL 3645154 (D. Neb. June 30, 2016)	§ 2255	63-78 mos.	75 mos.	33-41 mos.	41 mos.	Lower by 34 mos.
9th Cir.	*United States v. Benavides*, 617 F. App'x 790 (9th Cir. 2015) No. 4:13-cr-0718 (N.D. Cal.)	Direct appeal	84-105 mos.	87 mos.	30-37 mos.	35 mos.	Lower by 52 mos.
	United States v. Haycock, 652 F. App'x 531 (9th Cir. 2016) (No. 14-30152) No. 4:13-cr-251 (D. Idaho)	Direct appeal	37-46 mos.	40 mos.	21-27 mos.	Time served (approx. 18 mos.)	Lower by 22 mos.
∓	*United States v. Talmore*, No. 13-10650 (9th Cir. Aug. 24, 2015) No. 4:13-cr-00381 (N.D. Cal.)	Direct appeal	30-37 mos.	33 mos.	15-21 mos.	18 mos.	Lower by 15 mos.

₸	***Pressley v. United States***, __ F. Supp. 3d __, 2016 WL 4440672 (W.D. Wash. Aug. 11, 2016) (No. 2:12-cr-318)	§ 2255	84-105 mos.	120 mos.	46-57 mos.	60 mos.	Lower by 60 mos.
	United States v. Acoba, No. 3:12-cr-5343, 2016 WL 4611546 (W.D. Wash. Sept. 6, 2016)	§ 2255	70-87 mos.	70 mos.	37-46 mos.	Time served (50 mos.)	Lower by 20 mos.
₸	*United States v. Arredondo*, No. 2:12-cr-2084, 2016 WL 3448596 (E.D. Wash. June 20, 2016)	§ 2255	51-63 mos.	55 mos.	30-37 mos.	37 mos.	Lower by 18 mos.
₸	*United States v. Benard*, No. 3:12-cr-780, 2016 WL 5393939 (N.D. Cal. Sept. 27, 2016)	§ 2255	70-87 mos.	52 mos.	46-57 mos.	46 mos.	Lower by 6 mos.
	United States v. Bercier, __ F. Supp. 3d __, 2016 WL 3619638 (E.D. Wash. June 24, 2016) No. 2:13-cr-102 (E.D. Wash.)	§ 2255	51-63 mos.	51 mos.	30-37 mos.	37 mos.	Lower by 14 mos.
₸	*United States v. Castilleja*, No. 2:12-cr-2040 (E.D. Wash. June 24, 2016)	§ 2255	63-78 mos.	63 mos.	33-41 mos.	Time served (approx. 52 mos.)	Lower by 11 mos.

	United States v. Cloud, No. 2:10-cr-2077, ___ F Supp. 3d ___, 2016 WL 3647785 (E.D. Wash. June 24, 2016)	**§ 2255**	**110-137** mos.	**150 mos.**	**70-87 mos.**	**Time served** (approx. 72 mos.)	**Lower by 78** mos.
	United States v. Dean, 169 F. Supp. 3d 1097 (D. Or. Mar. 15, 2016) (No. 3:13-cr-137)	§ 2255	63-78 mos.	60 mos. concurrent w/undis-charged sentence	27-33 mos.	51 mos. (effective; 27 mos. consec. to 24 mos. undischarged sentence)	Lower by 9 mos. (effective)
₮	*United States v. Dockins*, No. 2:13-cr-2039, 2016 WL 4414790 (E.D. Wash. Aug 18, 2016)	§ 2255	92-115 mos.	77 mos.	33-41 mos.	Time served (approx. 51 mos.)	Lower by 26 mos.
₮	*United States v. Edmondson*, No. 2:13-cr-0144 (E.D. Wash. July 5, 2016)	§ 2255	92-115 mos.	120 mos.	63-78 mos.	78 mos.	Lower by 42 mos.
₮	*United States v. Espinoza*, No. 2:13-cr-769 (C.D. Cal. Sept. 21, 2016)	§ 2255	51-63 mos.	37 mos.	30-37 mos.	30 mos.	Lower by 7 mos.
₮	*United States v. Garcia*, __ F. Supp. 3d __, 2016 WL 4364438 (N.D. Cal. Aug. 16, 2016) (No. 4:13-cr-601)	§ 2255	37-46 mos.	30 mos.	18-24 mos.	21 mos.	Lower by 9 mos.
	United States v. Hotchkiss, No. 3:14-cr-00198, 2016 WL 4761780 (S.D. Cal. Sept. 13, 2016)	§ 2255	51-63 mos.	46 mos.	27-33 mos.	Time served (approx. 33 mos.)	Lower by 13 mos.

	United States v. Ortega, 2:11-cr-0087 (E.D. Wash. July 1, 2016)	§ 2255	92-115 mos.	120 mos.	51-63 mos.	65 mos.	Lower by 55 mos.
	United States v. Parker, No. 2:14-cr-211, 2016 WL 4418007 (W.D. Wash. Aug. 19, 2016)	§ 2255	46-57 mos.	38 mos.	37-46 mos.	Time served (approx. 26 mos.)	Lower by 12 mos.
₮	*United States v. Plumlee*, No. 2:10-cr-2037-RMP (E.D. Wash. June 24, 2016)	§ 2255	130-162 mos.	108 mos.	92-115 mos.	72 mos.	Lower by 36 mos.
	United States v. Rios, __ F. Supp. 3d __, 2016 WL 4472996 (E.D. Wash. Aug. 12, 2016) (No. 2:13-cr-2059)	§ 2255	51-63 mos.	60 mos.	30-37 mos.	Time served (approx. 44 mos.)	Lower by 16 mos.
	United States v. Robinson, No. 2:13-cr-0079-RMP (E.D. Wash. July 1, 2016)	§ 2255	110-120 mos.	107 mos.	41-51 mos.	13 mos. (51 mos. less 38 mos. for state time served)	Lower by 56 mos. (effective)
	United States v. Santos, No. 2:11-cr-566, 2016 WL 5661553 (C.D. Cal. Sept. 9, 2016)	§ 2255	92-115 mos.	84 mos.	51-63 mos.	Time served (approx. 64 mos.)	Lower by 20 mos.
₮	*United States v. Suttle*, No. 2:14-cr-00083, 2016 WL 3448598 (E.D. Wash. June 20, 2016)	§ 2255	37-46 mos.	87 mos.	18-24 mos.	30 mos.	Lower by 57 mos.

	United States v. Tomisser, __ F. Supp. 3d __, 2016 WL 3774128 (E.D. Wash. July 12, 2016) (No. 2:11-cr-2115)	§ 2255	63-78 mos.	78 mos.	33-41 mos.	Time served (approx. 57 mos.)	Lower by 21 mos.
10th Cir.	*United States v. Goodwin*, 625 F. App'x 840 (10th Cir. 2015) No. 1:12-cr-00100 (D. Colo.)	Direct appeal	110-137 mos. (w. 120 mo. stat. max.)	99 mos.	63-78 mos.	57 mos.	Lower by 42 mos.
	United States v. Porter, 643 F. App'x 758 (10th Cir. 2016) No. 1:14-cr-00187 (D. Colo.)	Direct appeal	92-115 mos.	96 mos.	63-78 mos.	78 mos.	Lower by 18 mos.
	Andrews v. United States, No. 2:12-cr-00616, 2016 WL 4734593 (D. Utah Sept. 9, 2016)	§ 2255	57-71 mos.	51 mos.	30-37 mos. [estimated]	33 mos.	Lower by 18 mos.
	Culp v. United States, No. 2:11-cr-293, 2016 WL 5400395 (D. Utah Sept. 27, 2016)	§ 2255	70-87 mos.	75 mos.	57-71 mos.	Time served (approx. 54 mos.)	Lower by 21 mos.
	United States v. Alderman, No. 2:12-cr-00661 (D. Utah Aug. 30, 2016)	§ 2255	63-78 mos.	66 mos.	33-41 mos.	41 mos.	Lower by 25 mos.
	United States v. Archer, No. 2:14-cr-00334 (D. Utah July 22, 2016)	§ 2255	70-87 mos.	30 mos.	24-30 mos.	24 mos.	Lower by 6 mos.

	United States v. Berrett, 1:13-cr-00004 (D. Utah Oct. 19, 2016)	§ 2255	77-96 mos.	48 mos.	51-63 mos.	Time served (approx. 45 mos.)	Lower by 3 mos.
	United States v. Bumgarner, No. 2:11-cr-00312 (D. Utah Sept. 14, 2016) Order entered in No. 2:16-cv-699 (Sept. 28, 2016)	§ 2255	51-63 mos.	56 mos.	30-37 mos.	37 mos.	Lower by 19 mos.
	United States v. Durete, __ F Supp. 3d __, 2016 WL 5791199 (D. Colo. Sept. 13, 2016) (No. 1:14-cr-71)	§ 2255	77-96 mos.	70 mos.	37-46 mos.	40 mos.	Lower by 30 mos.
	United States v. Mendez, No. 1:10-cr-37 (D. Utah. Aug. 26, 2016) Order entered in No. 1:16-cv-00053 (Oct. 24, 2016)	§ 2255	135-168 (w. 120 mo. stat. max.)	96 mos.	77-96 mos.	77 mos.	Lower by 19 mos.

REPLY BRIEF

Supreme Court, U.S.
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No. 15-8544

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v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Contrary to the arguments presented by the Court-Appointed Amicus, the advisory Sentencing Guidelines are subject to "the Constitution's prohibition of vague criminal laws," *Johnson* v. *United States*, 135 S. Ct. 2551, 2556 (2015). The calculation of the benchmark Guidelines range serves as the lodestar of the sentencing process, including appellate review, and exerts a substantial effect on the actual sentences imposed in most cases. The federal sentencing system gives the Guidelines range that role precisely because the range is understood to reflect the considered judgment of the expert Sentencing Commission, informed by congressional policy, about the appropriate range of punishment in light of a defendant's offense conduct and criminal history. But if a guideline is so "shapeless" that it is impossible to "derive meaning" from it, *id.* at 2560, the resulting range reflects nothing more than the judge's "guesswork" about what the

Commission recommended, *ibid.* (citation omitted). Using such an arbitrarily derived numerical range in the sentencing process, with the substantial effect the range typically exerts on the sentence imposed, denies a defendant due process in his sentencing proceeding.

In arguing that the Guidelines are exempt from vagueness scrutiny, amicus makes two main arguments, but neither has merit. First, amicus argues that because due process permits a purely discretionary sentencing scheme, it must also permit a scheme in which the judge's discretion is anchored at the outset to an arbitrarily determined benchmark range. That does not follow. An inscrutably vague guideline injects an element of arbitrariness into the sentencing process that is not found in a discretionary sentencing system that relies on individualized judicial judgment exercised in light of particular facts. In the advisory Guidelines system, a sentencing judge is legally compelled to treat the Guidelines range as the view of the expert Sentencing Commission, and to consider that range in the sentencing process. When a fatally vague guideline makes it impossible to know what the Sentencing Commission recommended, that process becomes arbitrary. Just as it would violate due process to choose the benchmark range by flipping a coin, calculating that range on the basis of a legal text from which it is impossible to "derive meaning" offends the right to a procedurally fair sentencing proceeding.

Second, amicus argues that this Court has struck down as vague only laws that "regulate private conduct" (Br. 12), by which he appears to mean laws that define crimes. This Court held in *Johnson*, however, that the vagueness doctrine applies equally to "statutes fixing sentences," 135 S. Ct. at 2557, so that dis-

tinction is incorrect. More importantly, this Court has never considered the procedural problem presented here: not that the statute fails to clearly define what conduct is proscribed or what the statutorily authorized sentencing range is, but rather that a vague guideline infects the sentencing process with a numerical range that the judge must consider as the Commission's expert view although it is calculated based on an incurably indeterminate legal provision. Amicus never explains how a sentencing proceeding that unfolds from such an arbitrarily determined starting point—a starting point that in most cases exerts a significant effect on the actual sentence imposed—can satisfy due process.

A. A Vague Guideline Violates Due Process Because An Important Sentencing Factor Is Determined Arbitrarily

1. As the government has explained in its opening brief (at 40-46), two intrinsic features of the advisory Sentencing Guidelines give rise to the due process problem with applying a vague guideline. First, the calculation of the advisory Guidelines range anchors and structures the sentencing process. The district court must correctly calculate the range—a miscalculation is a "significant procedural error"—and the parties' arguments largely key off of the range. *Gall* v. *United States*, 552 U.S. 38, 51 (2007). Because that range is understood to reflect the Sentencing Commission's expert recommendation in light of the defendant's offense conduct and criminal history, a district court must provide a greater justification for a sentence imposed outside the range, and an appellate court may presume that a within-Guidelines sentence is reasonable. *Ibid.* The Guidelines range thus "anchor[s] both the district court's discretion and the

appellate review process." *Peugh* v. *United States*, 133 S. Ct. 2072, 2087 (2013).

Second, calculating the Guidelines range does not involve an exercise of traditional sentencing discretion by the district court. The court does not at the Guidelines-range-calculation stage determine an appropriate sentence in light of all the relevant factors. Rather, calculating the starting benchmark range requires applying a legal text to particular facts. Defendants with the same offense conduct and the same criminal history are supposed to be assigned the same benchmark range. In that respect, calculation of the Guidelines range differs fundamentally from the district court's ultimate exercise of sentencing discretion under 18 U.S.C. 3553(a), which sets out the full array of general factors relevant to discretionary sentencing.

In light of those two features of the sentencing regime in place since *United States* v. *Booker*, 543 U.S. 220 (2005), a vague guideline violates a defendant's due process right to a procedurally fair sentencing proceeding. The reason that the range anchors the sentencing process is that courts understand it to reflect the considered judgment of the Sentencing Commission, informed by congressional policies. But when a guideline's text is so indeterminate that it cannot satisfy the criminal-law vagueness standard, it is impossible for the court to determine what in fact the Commission recommended—whether, for example, the Commission intended a particular offense to qualify as a "crime of violence." As a result, a Guidelines range based on a vague guideline reflects linguistic "guesswork," not reasoned application of factors relevant to determining a just and reasonable

sentence. *Johnson*, 135 S. Ct. at 2560 (citation omitted). And that procedural unfairness is magnified by the substantial effect that the Guidelines range exerts on the ultimate sentence imposed in most cases. See *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1346 (2016). For those reasons, anchoring the sentencing proceeding to such an arbitrarily determined factor offends due process.

2. Amicus seems to acknowledge (Br. 20-22) that the Court's established sentencing framework, under which the Guidelines range is the "lodestar" of the sentencing process and appellate review, *Molina-Martinez*, 136 S. Ct. at 1346, gives rise to a significant procedural problem when a vague guideline is used to calculate the range. But his response to that problem is to suggest that this Court's "post-*Booker* structure" has been ill-conceived, because "no particular sequence" is "prescribed by the statute or the *Booker* remedial opinion" and "*Booker* placed no specific emphasis on the Guidelines over any other factor." Amicus Br. 21-22. Amicus questions whether "these refinements would exist had the vagueness argument presented itself first," and for that reason deems it "remarkable" that the government relies on those features of the established sentencing regime to show why a vague guideline creates fundamental procedural unfairness. *Id.* at 22.

Amicus's attack on this Court's settled sentencing framework should be rejected. For nearly a decade this Court has held that the Guidelines range plays a procedural role of overriding importance in the sentencing process. See *Gall*, 552 U.S. at 49-50. That recognition flows from the emphasis in *Booker* itself on the role that the Commission's expertise, and the

advisory Guidelines system, would play in achieving Congress's objective of "avoid[ing] excessive sentencing disparities." 543 U.S. at 264-265. Although amicus sees the advisory range as no different from any other factor that a sentencing judge considers, this Court has reached the opposite conclusion, explaining that "[t]he federal system adopts procedural measures intended to make the Guidelines the lodestone of sentencing." *Peugh*, 133 S. Ct. at 2084. The Guidelines serve that central role because they reflect the views of the Sentencing Commission and congressional policy. But when a guideline's text is so vague that the Commission's recommendation cannot be ascertained, structuring the sentencing proceeding around a judge's guess at the provision's meaning creates an intolerable risk that the sentence imposed is the product of "unfair and arbitrary judicial action," which the Due Process Clause forbids. *Rogers* v. *Tennessee*, 532 U.S. 451, 466-467 (2001).

3. Amicus contends (Br. 28-30) that this Court's decision in *Peugh* lacks legal relevance here because *Peugh* applied the "significant risk" standard developed in this Court's Ex Post Facto Clause precedents. *Peugh*, 133 S. Ct. at 2088. While it is true that *Peugh* applied the "significant risk" standard, amicus misses the broader import of the Court's analysis. The Court concluded that creating a "significant risk" of a higher Guidelines sentence based on a retroactive provision would violate basic notions of "fundamental justice," even though the Guidelines are merely advisory, and even though the retroactive guideline could not change the statutorily authorized range of punishment. *Id.* at 2084, 2088 (citation omitted).

A similar analysis applies here. Like the bar on ex post facto laws, the vagueness doctrine is founded on "ordinary notions of fair play and the settled rules of law." *Johnson*, 135 S. Ct. at 2556-2557 (citation omitted). The lesson of *Peugh* is that violating such fundamental legal norms in promulgating Guidelines provisions, in a way that is likely to increase the typical defendant's sentence, can be unconstitutional even if the statutory range of punishment is not increased. In this context, when a court applies a Guidelines provision that is so vague that it would be declared void on its face if it were a criminal statute, and that application is likely to increase the sentences that most defendants subject to it would otherwise receive, the process offends "fundamental justice."[1]

Amicus also seems to dispute (Br. 23) the proposition that the Guidelines range in fact exerts a significant effect on actual sentences imposed, despite this Court's recognition just seven months ago of the "real and pervasive effect" that the Guidelines have on sentences. *Molina-Martinez*, 136 S. Ct. at 1346. He notes that last year slightly fewer than half of federal sentences fell within the Guidelines range. But that is not the proper measure of the effect of the Guidelines on sentencing. This is not only because the majority of below-range sentences are government-sponsored and thus authorized by the Guidelines; it is because the

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[1] Although amicus contends (Br. 28-29) that *Peugh* rested on the concern with legislative vindictiveness against disfavored groups, that consideration was mentioned only by the plurality, which suggested that it was not "directly implicated," 133 S. Ct. at 2085, while the majority relied on the interest in "fundamental justice," *id.* at 2088 (citation omitted).

range affects even out-of-range sentences. A judge who believes that a defendant is atypical may choose to impose a sentence outside the Guidelines range, but the starting point still has substantial influence on the ultimate sentence. As this Court has repeatedly explained, "when a Guidelines range moves up or down, offenders' sentences [tend to] move with it." *Ibid.* (brackets in original) (quoting *Peugh*, 133 S. Ct. at 2084). That direct relationship between the Guidelines range and the sentences actually imposed underscores the procedural unfairness of calculating the range based on a provision that is so "shapeless" that it cannot satisfy the criminal-law vagueness standard. *Johnson*, 135 S. Ct. at 2560.

4. Amicus relies (Br. 24-26) on this Court's holding in *Irizarry* v. *United States*, 553 U.S. 708 (2008), that the Due Process Clause does not entitle a defendant to notice that the district court will vary from the advisory Guidelines range. *Id.* at 713-714. But he does not seriously address the government's explanation (U.S. Br. 47) of why the due process problem generated by a vague guideline differs from the notice issue discussed in *Irizarry*.

The problem with a vague guideline is not that a defendant lacks notice that he could be sentenced anywhere within the statutorily authorized range of punishment. After *Booker*, he clearly has such notice, which is why *Irizarry* held that no further notice is required. 553 U.S. at 713. A defendant always knows to make arguments based on the particular facts of his case in light of the Section 3553(a) factors because the judge must always consider those factors. A vague guideline, in contrast, hinders procedural fairness on two levels. First, it makes it difficult or impossible to

frame logical arguments to influence the judge's calculation of the range. And second, it skews the framework for sentencing because it produces a starting range that the judge will assume reflects the expert views of the Sentencing Commission. But in reality, the fatal indeterminacy of the guideline text means that the range was calculated arbitrarily, based on the judge's guess at what the language means, or how it applies to the case at hand, rather than on any consideration of relevance to criminal sentencing. That kind of procedural unfairness was not at issue in *Irizarry*. No inconsistency exists in concluding that a defendant has no due process right to case-specific notice that the judge may vary from the Guidelines range, but that he does have a due process right to have the judge calculate the Guidelines range in a non-arbitrary manner.

B. A Vague Guideline Injects Potential Arbitrariness Into The Sentencing Process In A Manner That Is Not Found In Purely Discretionary Sentencing

Amicus contends (Br. 12-14) that because a system of "pure discretionary sentencing is constitutional," due process permits a district court to anchor the sentencing process around a range derived from a vague guideline. That contention is incorrect.

1. In a traditional discretionary sentencing system, the sentencing judge considers the full range of relevant aggravating and mitigating facts and circumstances, as well as her view of proper sentencing policy, and then exercises sentencing discretion in light of those relevant considerations. As a leading Nineteenth Century treatise explained, when "the punishment is discretionary with the tribunal," the sentencer "listen[s] to the aggravating and mitigating facts, and

place[s] it where justice and sound policy for the particular instance dictate." 1 Joel Prentiss Bishop, *New Commentaries on the Criminal Law* § 601, at 371 (8th ed. 1892) (cited in *Apprendi* v. *New Jersey*, 530 U.S. 466, 519 (2000) (Thomas, J., concurring)). That system draws on individualized judicial judgment to determine the appropriate sentence in light of particular facts, reflecting the unique considerations that bear on the sentence in each case. See *Koon* v. *United States*, 518 U.S. 81, 113 (1996) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."). Courts have exercised that sort of individualized judgment for centuries, *Apprendi*, 530 U.S. at 481 (citing *Williams* v. *New York*, 337 U.S. 241, 246 (1949)), and the reliance on judicial judgment to frame reasoned sentences within broad ranges has never been thought to reflect the sort of arbitrariness that violates due process.[2]

An inscrutably vague advisory guideline, however, injects arbitrariness into the sentencing process that

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[2] Arbitrary action is action "with no purpose or objective." Bryan A. Garner, *A Dictionary of Modern Legal Usage* 73 (1995). An individualized discretionary sentencing, by contrast, relies on "conscientious judgment, not arbitrary action," and is conducted in accord with "familiar principles governing the exercise of judicial discretion." *Burns* v. *United States*, 287 U.S. 216, 222-223 (1932) (discussing discretionary probation revocation). The judge "takes account of the law and the particular circumstances of the case and is 'directed by the reason and conscience of the judge to a just result.'" *Id.* at 223 (quoting *Langnes* v. *Green*, 282 U.S. 531, 541 (1931)).

is not found in the exercise of unguided discretion in a traditional sentencing system. Lower courts have consistently recognized, for example, that a court's reliance on material factual misinformation at sentencing may violate due process.[3] Reliance on an arbitrarily calculated range raises similar concerns. A vague guideline requires the sentencing judge to take into account an erroneous consideration: namely, that the expert Sentencing Commission recommended a particular range for the defendant based on his offense characteristics and criminal history, even though no one knows what the Commission recommended. The district judge must nevertheless treat the range as reflecting the considered views of the Commission; indeed, the judge would commit procedural error by failing to take into account that range in her sentencing determination or by failing to offer a sufficiently detailed explanation for varying from it. And likewise, if the defendant appeals a within-Guidelines sentence, the appellate court must also deem the sentence consistent with the recommendation of the Sentencing Commission and may for that reason apply a presumption of reasonableness even though, in reality, the Commission's views cannot be discerned.

That violates due process. To require a sentencing judge and an appellate court to treat a numerical range as the recommendation of an expert commis-

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[3] See, *e.g.*, *Hili* v. *Sciarrotta*, 140 F.3d 210, 215 (2d Cir. 1998) ("It is well established that a defendant has a due process right not to be sentenced on the basis of information that is materially false."); *United States* v. *Pellerito*, 918 F.2d 999, 1002 (1st Cir. 1990) (same); *United States* v. *Reid*, 911 F.2d 1456, 1463-1464 (10th Cir. 1990) (same), cert. denied, 498 U.S. 1097 (1991).

sion, when the text of the provision renders it impossible to know what the commission actually concluded, infringes "ordinary notions of fair play," *Johnson*, 135 S. Ct. at 2556-2557 (citation omitted). The result is that the sentencing process will be skewed by misinformation about the Commission's views on the appropriate sentence, because the judge must calculate and consider the range based on a legal text from which it is impossible to "derive meaning." *Id.* at 2560.

A sentence imposed under a purely discretionary sentencing system does not produce that type of arbitrariness. The system is simply individualized. For generations, legislatures have relied on individual judicial judgment to balance case-specific equities in order to impose a fair sentence. That system will not generate uniformity, see *Mistretta* v. *United States*, 488 U.S. 361, 365-366 (1988) (noting "[s]erious disparities" in the discretionary system), but vesting judges with responsibility to fix sentences based on unique facts is not arbitrary. In contrast, it is arbitrary to require judges to guess about the meaning of text that amounts to a linguistic "black hole," *Johnson*, 135 S. Ct. at 2562 (citation omitted), and then calculate a numerical range derived from that guess as the "lodestar" of sentencing, *Molina-Martinez*, 136 S. Ct. at 1346; see also 18 U.S.C. 3553(a)(6) (directing judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"); *Gall* 552 U.S. at 54 (consideration of the advisory range helps to "avoid unwarranted disparities"). Such a legal regime is arbitrary because the court is forced to employ a sentencing benchmark that cannot rationally

be determined because the text that governs it is hopelessly vague.

2. A hypothetical example illustrates the point. Suppose that a sentencing judge were required to flip a coin to determine a starting benchmark range—a range that shapes the ensuing sentencing process by "inform[ing] and instruct[ing] the district court's determination of an appropriate sentence," *Molina-Martinez*, 136 S. Ct. at 1346, and that would entitle any sentence within that range to a "presumption of reasonableness" on appellate review, *Gall*, 552 U.S. at 51. Heads would produce a starting range of 262 to 327 months, tails a range of 360 months to life. Cf. Pet. Br. 6. Such a sentencing regime would produce arbitrary and unfair results that do not exist in a purely discretionary system that relies on good-faith judicial judgment informed by the relevant facts. When a coin flip dictates radical differences in the starting point and initial benchmark for sentencing, the sentencing process and likely outcome would be determined entirely by chance.

Applying a fatally vague guideline is not as arbitrary as a coin flip, but its effect on the sentencing process is similar. *Johnson* held that the language at issue here is "a black hole of confusion and uncertainty" and described how lower courts had reached widely divergent rulings about particular categories of predicate offenses based on "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider." 135 S. Ct. at 2560, 2562 (citation omitted). Such "unavoidable uncertainty and arbitrariness of adjudication" *id.* at 2562, means that in many cases, the starting benchmark for a defendant's sentencing

proceeding will be determined based on a judge's "guesswork and intuition," *id.* at 2559, about the applicability of an indeterminate phrase. For example, enhanced sentencing ranges for violent recidivists may be wrongly or randomly assigned to defendants who should not bear that treatment in the Commission's judgment. Judges will of course struggle in good faith to apply vague language. But when the language reaches the level of inscrutability for criminal vagueness, they cannot avoid arbitrary results.

Amicus is therefore wrong that a vague guideline "does not make things worse" (Br. 14) than purely discretionary sentencing. Discretionary sentencing is individualized, not arbitrary. In contrast, a vague guideline requires judges to treat a numerical range that was derived through conjecture about the meaning of a critical phrase as reflecting the considered views of the Sentencing Commission, and to accord that benchmark a central role in the sentencing process.

3. In its opening brief, the government explained (at 43-44) that, in the Eighth Amendment context, this Court has recognized that a jury's consideration of a vague aggravating factor is unconstitutional, even if the jury's role is only to recommend a sentence to the judge and the judge does not directly consider the vague factor but merely gives weight to the jury's recommendation. *Espinosa* v. *Florida*, 505 U.S. 1079, 1082 (1992) (per curiam). That holding is relevant here because it illustrates the "potential for arbitrariness," *ibid.*, when a vague standard informs one consideration that the sentencer must take into account.

Amicus states (Br. 19-20 & n.2) that the opening brief "lifted" *Espinosa* out of context because "pure

discretionary sentencing" is not permitted in the capital-sentencing context, so *Espinosa*'s invalidation of a vague indirect factor is not relevant to non-capital sentencing, where discretionary sentencing is permissible. That argument reflects a misunderstanding of Eighth Amendment doctrine. It is true that at the first, "eligibility" phase of capital sentencing, "a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty." *Loving* v. *United States*, 517 U.S. 748, 755 (1996) (citations and internal quotation marks omitted). But once it is determined that the defendant falls within a narrower category of offenders (either through aggravating elements of the offense or an eligibility-phase sentencing proceeding, see *ibid.*), the sentencer then may consider the full range of relevant considerations during the "selection" phase. See *Buchanan* v. *Angelone*, 522 U.S. 269, 275-276 (1998). The Constitution thus permits the jury to have "unbridled discretion" to consider relevant evidence at that phase. *Ibid.*

Espinosa concerned the second, "selection" phase of capital sentencing. See 505 U.S. at 1083 (Scalia, J., dissenting) ("Since the Florida courts found several constitutionally sound aggravating factors in this case, Espinosa's death sentence unquestionably comports with the 'narrowing' requirement of *Furman* v. *Georgia*, 408 U.S. 238 (1972)."). The Court held that the invalid aggravating factor had, through the jury's nonbinding recommendation to the judge, skewed the judge's "weighing [of] aggravating and mitigating circumstances." *Id.* at 1081-1082. The Court explained that the weighing of a factor that that "is so vague" that it does not provide "sufficient guidance for determining the presence or absence of the factor"

creates a fatal "potential for arbitrariness," even if the factor serves only as one consideration in a non-binding recommendation to the ultimate sentencer. *Ibid.* *Espinosa* therefore illustrates that even where the Constitution permits discretionary sentencing, incorporating an impermissibly vague factor into a non-binding recommendation, to which the decisionmaker must accord "great weight," *id.* at 1082, can render the ultimate sentencing determination unconstitutionally arbitrary.

C. A Vague Guideline Gives Rise To Fundamental Procedural Unfairness Even Though It Does Not "Regulate Private Conduct"

Amicus also contends that the vagueness doctrine applies only to "measures that directly regulate private conduct" and that for that reason the Guidelines are not subject to the vagueness doctrine. Br. 14 (capitalization altered). That argument lacks merit.

1. As an initial matter, amicus is incorrect (Br. 17) that "[t]he common thread" weaving through all of this Court's vagueness decisions "is that measures were void because the public could not know what was proscribed." Although most of this Court's vagueness decisions have concerned provisions drawing the line between lawful and unlawful conduct, this Court has also concluded that statutory provisions delineating the punishment for indisputably unlawful conduct are subject to the vagueness doctrine. Indeed, *Johnson* itself held as much: "[Vagueness] principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences." 135 S. Ct. at 2557 (citing *United States* v. *Batchelder*, 442 U.S. 114, 123 (1979); see *United States* v. *Evans*, 333 U.S. 483, 487-488 (1948) (holding that a statute that prescribed "no

penalty" for an offense was impermissibly vague). Although amicus claims (Br. 16) that *Johnson* applied the vagueness doctrine to the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), only because the ACCA "define[s] a separate crime," this Court has never held that ACCA defines a separate crime. It is a sentencing provision.

2. In any event, amicus's "private conduct" argument fails to grapple with the basic reason that a vague guideline violates due process: not because it leaves uncertainty about what conduct is unlawful, or about the statutorily authorized range of punishment for that conduct, but because it fundamentally distorts the process of sentencing by anchoring the judge's exercise of discretion to an arbitrarily determined range.

It is true that the problem here is different from the problem in other cases in which this Court has declared a statute void for vagueness. In those cases, the challenged statute gave rise to a *substantive* problem: A person of ordinary intelligence could not determine what conduct was prohibited or what range of punishment was prescribed for the offense. That is why those holdings applied retroactively on collateral review. See *Welch* v. *United States*, 136 S. Ct. 1257, 1263-1268 (2016).

By contrast, a vague advisory guideline gives rise to a *procedural* problem: The sentencing process is anchored to a starting benchmark determined arbitrarily, based on a court's conjecture about the meaning of an impenetrable text, not based on the reasonably discernible views of the Sentencing Commission or any other criteria relevant to the sentencing process. Yet the federal sentencing framework requires the

court to treat that range as reflecting the considered judgment of the Commission. It is that procedural problem, in conjunction with the Guidelines' significant effect on sentences actually imposed, that offends due process.

Amicus does not seriously address that argument. He merely argues (Br. 15-17) that this Court has never held a provision akin to an advisory guideline void for vagueness. That is true, but it is equally true that the Court has never held that such a provision is immune from vagueness scrutiny. It is not an issue that has previously arisen, because nothing quite like the advisory Guidelines existed for federal sentencing before *Booker*. The question to resolve here, therefore, is whether the basic guarantee of the Due Process Clause against "unfair and arbitrary judicial action," *Rogers*, 532 U.S. at 466-467, is implicated when a district court is legally required to consider a range calculated based on a "hopeless[ly] indetermina[te]" provision of the Guidelines, *Johnson*, 135 S. Ct. at 2558. For the reasons discussed above, that procedural unfairness violates due process.

3. Amicus relatedly argues (Br. 20) that the government has "offer[ed] no principle to determine when a non-binding measure becomes 'binding enough' to risk being unconstitutionally vague." That argument misses the point. The Guidelines range is not substantively binding in any sense; a judge has authority to impose a sentence anywhere within the statutorily authorized range. That is why a judge's fact-finding in calculating the range does not violate the Sixth Amendment. *Booker*, 543 U.S. at 233. And contrary to amicus's suggestion (at 32-33), applying vagueness principles to advisory Guidelines no more risks recre-

ating a Sixth Amendment problem than applying the *Ex Post Facto* Clause, see *Peugh*, 133 S. Ct. at 2087-2088. The due process problem arises from the vital *procedural* role that the Guidelines range plays in the sentencing process and in appellate review. Though not binding, the starting benchmark must be taken by the parties and the courts to reflect the considered recommendation of the Sentencing Commission. If that range was instead determined through the judge's "guesswork and intuition," *Johnson*, 135 S. Ct. at 2559, the ensuing process is unfair.

D. Subjecting The Guidelines To Vagueness Scrutiny Will Not Impede The Work Of The Sentencing Commission

Amicus contends (Br. 30-35) that subjecting the Guidelines to vagueness scrutiny would "threaten[] the work of the Commission and could wreak havoc on the states that use sentencing guidelines." *Id.* at 33. That concern is groundless. Applying the vagueness doctrine here is highly unlikely to invalidate other guidelines currently in force. And more importantly, where a guideline is so unclear that it would be facially void for vagueness, it does not serve the Commission's interests to have federal judges continue to engage in the "failed enterprise" of attempting to apply it. *Johnson*, 135 S. Ct. at 2560.

1. Amicus contends (Br. 31-33) that many other provisions of the Guidelines would be vulnerable to a vagueness challenge. That is incorrect. The problem with the residual clause of the ACCA and the former residual clause of Section 4B1.2(a)(2) arises from a confluence of "uncertainties": applying a risk standard to the ordinary case of an offense; the requirement that judges consider conduct that might occur after

completion of the offense; the confusing list of enumerated crimes; and the long history of failed efforts by this Court to construe that language and the widespread confusion among lower courts. *Johnson*, 135 S. Ct. at 2560; see *id.* at 2557-2560. It was the "sum" of those problems that led the Court to conclude that the ACCA's language was unconstitutionally vague, *id.* at 2560 (citation omitted), and that requires the same result here.

No reason exists to believe that other provisions of the Guidelines raise comparable vagueness concerns. Indeed, the Ninth Circuit has held for at least 25 years that the Guidelines are subject to vagueness scrutiny, see *United States* v. *Helmy*, 951 F.2d 988, 993 (9th Cir. 1991), cert. denied, 504 U.S. 945 (1992), yet that court has never held that a guideline is unconstitutionally vague. The former residual clause of Section 4B1.2(a)(2) stands alone.

Amicus's lead example of a provision that would be in jeopardy under vagueness doctrine is the vulnerable-victim guideline, § 3A1.1, which increases a defendant's offense-conduct score by two levels "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim," defined in the commentary to include, *inter alia*, a victim "who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." Sentencing Guidelines § 3A1.1 & comment. (n.2). Unlike the residual clause, however, that provision calls for a case-specific evaluation of whether the victim was particularly vulnerable to the criminal scheme, with the commentary giving the examples of "a fraud case in which the defendant marketed an ineffective cancer cure," or "a rob-

bery in which the defendant selected a handicapped victim," *ibid.* Although different judges might disagree in borderline cases over whether a victim was especially susceptible to particular offense conduct, that provision does not involve basic uncertainty about "the nature of the inquiry" that courts must undertake, *Johnson*, 135 S. Ct. at 2560. And disagreements about close cases under an intelligible, if qualitative, standard do not make a provision vague. *United States* v. *Williams*, 553 U.S. 285, 305-306 (2008). Indeed, *Johnson* itself did "not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct," 135 S. Ct. at 2561, and the vulnerable-victim guideline is just such a provision.

The same is true of the other provisions that amicus cites. They bear no similarity either to the categorical risk analysis that *Johnson* found problematic or to other statutes that this Court has held unconstitutionally vague, which often relied on subjective value judgments open to a wide range of interpretation. See, *e.g.*, *Coates* v. *City of Cincinnati*, 402 U.S. 611, 615-616 (1971) (holding unconstitutionally vague ordinance prohibiting "annoying" conduct); *United States* v. *L. Cohen Grocery*, 255 U.S. 81, 89 (1921) ("unjust or unreasonable rate or charge").

Furthermore, no sound basis exists to believe that the Commission would draft unconstitutionally vague guidelines in the future. Apart from Section 4B1.2(a)(2)'s former residual clause, which was borrowed from the ACCA, and which this Court declared unconstitutional only after a decade of efforts to construe it, amicus has pointed to no evidence that the Commission has struggled to draft guidelines that are

sufficiently clear to satisfy the minimal standard of the vagueness doctrine. Moreover, as explained in the government's opening brief (at 53-57), any ambiguity in the text of a guideline can be eliminated or reduced through the Commission's authoritative commentary.

2. Amicus also contends (Br. 30-31) that if the Guidelines are subject to the vagueness doctrine, the statutory sentencing factors set forth at 18 U.S.C. 3553(a) would also be invalid. As explained in the government's opening brief (at 42), that is incorrect. The Section 3553(a) factors essentially capture the general set of considerations relevant to a sentencing determination. Just as traditional discretionary sentencing regimes do not raise due process problems, a statutory command to consider a set of general factors in sentencing is not unconstitutionally vague. The Guidelines are different because they require a court to decide whether the facts of the case satisfy a legal standard in order to derive a specific numerical range. That range reflects the expert recommendation of the Sentencing Commission, and for that reason it structures the sentencing process and appellate review, and it exerts a substantial effect on the sentences actually imposed. The general Section 3553(a) factors have none of those characteristics.

3. Finally, amicus argues (Br. 33-35) that applying the vagueness doctrine to the Guidelines will impede the work of the Sentencing Commission. The opposite is true. If the Commission drafts a guideline that is so indefinite that it would be subject to facial invalidation for vagueness, then courts necessarily would struggle and fail to ascertain the Commission's true recommendation. Requiring courts to continue engaging in a "task * * * which at best could be only guesswork,"

Johnson, 135 S. Ct. at 2560 (citation omitted), does not vindicate the Commission's important role.

Amicus also asserts (Br. 33) that the "Commission is charged with addressing the same questions that this Court is asking in this case," such as whether a guideline is "still fit for its intended purpose and, if not, [whether] an amendment eliminating it [should] be retroactive." Those are not the questions posed by a vagueness challenge like this. Rather, the question is whether the Commission has expressed its meaning with sufficient clarity that a court can apply the guideline in a non-arbitrary manner. Nor is a vagueness challenge, as amicus characterizes it (Br. 34), "an attempt to obtain judicial second-guessing of the Commission's expert decisions." It instead is an argument that the Commission's recommendation cannot be discerned. As amicus himself puts it (Br. 30), "[b]y definition," when a provision is unconstitutionally vague, "no one knows what it means." If "no one knows" what a Guidelines provision means, it is hard to see how continuing to enforce that provision respects the Commission's work.

* * * * *

For the reasons stated in the government's opening brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General

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RECORD
AND
BRIEFS

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

No: 15-8544

TRAVIS BECKLES,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

This supplemental brief advises the Court of the published decision of the United States Court of Appeals for the Fourth Circuit in *In re Hubbard*, No. 15-276 (4th Cir. June 8, 2016), holding that *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), applies retroactively to sentences enhanced under the United States Sentencing Guidelines. The Fourth Circuit rejected the government's argument that *Johnson* is "procedural" as applied to the Guidelines, noting that "the decision in *Welch* [*v. United States*, 136 S. Ct. 1257 (2016),] declared unequivocally that *Johnson* was 'a substantive decision and so has retroactive effect under *Teague* in cases on collateral

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review' and the government has cited no case to support the proposition that a rule can be substantive in one context but procedural in another." *Hubbard*, Slip op. at 18-19.

In light of *Hubbard*, this Court's prompt intervention is required to ensure uniformity in the lower courts. The petition should be granted.

Respectfully submitted,

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Fort Lauderdale, Florida
June 8, 2016

No: 15-8544

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

TRAVIS BECKLES,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE

I certify that on this 8th day of June, 2016, in accordance with SUP. CT. R. 29, copies of the Supplemental Brief for Petitioner were served by third party commercial carrier for delivery within three days upon the United States Attorney for the Southern District of Florida, 99 N.E. 4th Street, Miami, Florida 33132-2111, and upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-276

In Re: CREADELL HUBBARD,

Movant.

On Motion under 28 U.S.C. § 2244 for Order Authorizing District Court to Consider Second or Successive Application for Relief under 28 U.S.C. § 2255 in the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (5:88-cr-00040-BO-1)

Argued: January 28, 2016 Decided: June 8, 2016

Before GREGORY and HARRIS, Circuit Judges, and DAVIS, Senior Circuit Judge.

Motion granted by published opinion. Judge Gregory wrote the opinion, in which Judge Harris and Senior Judge Davis joined.

ARGUED: Paul K. Sun, Jr., ELLIS & WINTERS LLP, Raleigh, North Carolina, for Movant. Seth Morgan Wood, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Respondent. **ON BRIEF**: Kelly Margolis Dagger, ELLIS & WINTERS LLP, Raleigh, North Carolina, for Movant. Thomas G. Walker, United States Attorney, Jennifer P. May-Parker, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Respondent.

GREGORY, Circuit Judge:

Movant Creadell Hubbard seeks pre-filing authorization to pursue a successive § 2255 petition for habeas relief. For the reasons that follow, we grant his motion.

I.

On July 19, 1988, Creadell Hubbard was indicted on the following numbered criminal counts: (1) armed bank robbery, 18 U.S.C. § 2113(a) & (d); (2) carrying a firearm during a crime of violence, id. § 924(c)(1) & (3); (3) possessing stolen money, id. § 2113(c) & (d); and (4) conspiracy to possess stolen money, id. Hubbard was convicted by a jury on all four counts. The district court determined at sentencing that Hubbard was a career offender under U.S. Sentencing Guidelines Manual § 4B1.1 (U.S. Sentencing Comm'n 1988) ("Sentencing Guidelines") because two of his prior convictions were for "crime[s] of violence." United States v. Hubbard, No. 89-5146, 1990 WL 194520, at *2 (4th Cir. Dec. 10, 1990) (unpublished). The prior convictions were for second-degree murder and Kentucky third-degree burglary. Id. at *3. Counts 1, 3, and 4 were merged for sentencing purposes, and the district court imposed a 327-month term of imprisonment for those counts, along with a consecutive sixty-month prison term for Count 2. In addition, the district court imposed a three-year term of supervised release.

Hubbard timely appealed to this Court, citing as error the district court's (1) failure to sever his trial from that of his codefendant; (2) denial of his motion for judgment of acquittal for insufficiency of the evidence; and (3) finding that Kentucky third-degree burglary was a predicate crime of violence supporting his career-offender status. Id. at *1-3. Hubbard's convictions and sentence were affirmed. Id. at *2, *4. In April 1997, Hubbard filed a motion to vacate under 28 U.S.C. § 2255. Proceedings on that motion ultimately resulted in summary judgment against Hubbard and dismissal of his subsequent appeal to this Court. United States v. Hubbard, No. 99-7147, 2000 WL 328084, at *1 (4th Cir. Mar. 29, 2000) (unpublished).

In August 2015, Hubbard filed a pro se motion with this Court seeking an order authorizing the district court to consider a successive § 2255 motion, citing Johnson v. United States, 135 S. Ct. 2551 (2015). We now address that motion.

II.

Successive petitions for federal habeas corpus review under § 2255 may not be filed in a district court without prior approval from a circuit court of appeals. 28 U.S.C. § 2255(h); In re Vassell, 751 F.3d 267, 268-69 (4th Cir. 2014). In deciding whether to grant the motion for pre-filing authorization, this Court must determine whether it relies on

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

§ 2255(h). It is the latter of these that Hubbard seeks to show.

Hubbard argues that the Supreme Court's decision in Johnson produced a new rule of constitutional law made retroactive by that Court, and that he is entitled to seek relief under the new rule. While his motion was pending, the Supreme Court decided Welch v. United States, 136 S. Ct. 1257 (2016), which confirmed Hubbard's position that the rule in Johnson is retroactive. Id. at 1265. With the retroactivity of Johnson established, it remains for this Court to determine whether the rule can support Hubbard's habeas claims.

Hubbard argues that the holding in Johnson can provide him relief in two ways. First, he seeks to apply Johnson to eliminate his conviction for carrying a firearm during a crime of violence (Count 2), arguing that federal armed bank robbery (Count 1 and the predicate for Count 2) is no longer a crime of violence under the rule established in Johnson. Second, he seeks to challenge his career-offender status by arguing that, under Johnson, Kentucky third-degree burglary no longer

qualifies as a crime of violence under the Sentencing Guidelines. Since Hubbard's motion was filed, this Court has decided, consonant with our precedent, that federal armed bank robbery is a crime of violence, specifically under the "force clause" of 18 U.S.C. § 924(c)(3), and that the holding in Johnson is inapplicable. United States v. McNeal, 818 F.3d 141, 151-57 (4th Cir. 2016). As a result, the only one of Hubbard's claims that remains viable is his argument that his Kentucky third-degree burglary conviction is no longer a predicate for establishing his career-offender status.

In analyzing the motion, we need not decide whether Hubbard will ultimately prevail on his claim, only whether he is entitled to pursue a successive claim. In re Williams, 330 F.3d 277, 282 (4th Cir. 2003). At this stage, the moving party need only "make[] a prima facie showing that the application satisfies the requirements of [§ 2244]" to gain pre-filing authorization. 28 U.S.C. § 2244(b)(3)(C).[1] Thus, Hubbard only needs to show that he "presents a claim that 'relies on a [qualifying] new rule of constitutional law,'" In re Vassell, 751 F.3d at 271 (quoting § 2244(b)(2)(A)) (alteration in Vassell) (emphasis added), and that he makes "a sufficient

[1] While Hubbard's motion relies on § 2255, that provision incorporates by reference the factors listed in § 2244.

showing of possible merit to warrant a fuller exploration by the district court," Williams, 330 F.3d at 281 (citation and internal quotation marks omitted).

We now turn to the substance of Hubbard's remaining claim.

III.

In 2015, the Supreme Court struck the residual clause of the Armed Career Criminal Act ("ACCA") for being unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. Johnson, 135 S. Ct. at 2555-57. "The void-for-vagueness doctrine prohibits the government from imposing sanctions 'under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.'" Welch, 136 S. Ct. at 1262 (quoting Johnson, 135 S. Ct. at 2556). The now-invalidated ACCA residual clause made any crime punishable by more than one year in prison and that "otherwise involve[d] conduct that present[ed] a serious potential risk of physical injury to another" a violent felony. 18 U.S.C. § 924(e)(2)(B)(ii). Applying the vagueness doctrine, the Supreme Court concluded that the ACCA's residual clause was unconstitutional under both standards: it failed to provide "fair notice to defendants" and "invite[d] arbitrary enforcement by judges." Johnson, 135 S. Ct. at 2557.

In this case, the parties do not dispute that Johnson would permit the Court to authorize a petitioner to file a successive § 2255 motion under the appropriate circumstances: Johnson announced a new rule of constitutional law that the Supreme Court made retroactive and that was previously unavailable. See 28 U.S.C. § 2255(h)(2). Instead, the government argues that Hubbard's claim fails on two grounds: first, that Johnson applies only to the ACCA's residual clause, not to residual clauses found at 18 U.S.C. §§ 16(b) & 924(c)(3)(B); and second, that Hubbard's challenge fails regardless because his sentence was determined using the Sentencing Guidelines (which, until November 1989, incorporated by express reference the definition of "crime of violence" set forth in § 16(b) into the career-offender guideline), making application of Johnson to this case procedural (rather than substantive) and therefore not retroactive. We are not persuaded by either of the government's contentions.

A.

Turning to the government's first argument, this Court must answer whether the Johnson rule applies to the distinct but similar residual clause at issue in Hubbard's case.

"In determining whether a prior conviction triggers a sentence enhancement under the Sentencing Guidelines, we approach the issue categorically, looking only to the fact of

conviction and the statutory definition of the prior offense." United States v. Montes-Flores, 736 F.3d 357, 364 (4th Cir. 2013) (citation and internal quotations omitted). The statute under which Hubbard was convicted defines third-degree burglary as burglary of a building, and "building" refers to both dwellings and nondwellings. Hubbard, 1990 WL 194520, at *3 (citing Ky.Rev.Stat.Ann. §§ 511.010, 511.040). Hubbard was sentenced on April 21, 1989, as a career offender under U.S.S.G. § 4B1.1,[2] which in turn relied on § 4B1.2 for definitions of key terms. At that time, as noted, § 4B1.2 defined the term "crime of violence" by reference to 18 U.S.C. § 16. U.S.S.G. § 4B1.2(1) (U.S. Sentencing Comm'n 1988); see also 18 U.S.C. § 16(b) (1988) (defining "crime of violence" as one that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"). Under that definition the district court found, and a panel of this Court affirmed, that Kentucky

[2] At the time, the relevant provision read:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1 (U.S. Sentencing Comm'n 1988).

third-degree burglary was a crime of violence. Hubbard, 1990 WL 194520, at *3. The offense was therefore treated as one of the predicate crimes of violence contributing to Hubbard's career-offender status for purposes of applying the Sentencing Guidelines. Hubbard now seeks permission to challenge his career-offender status by applying the new constitutional rule announced in Johnson to the § 16(b) definition of a crime of violence (and thereby to the then-relevant version of U.S.S.G. § 4B1.2).

The government argues that Johnson only invalidated the residual clause of the ACCA, 18 U.S.C. § 924(e)(2)(B), and has no application to 18 U.S.C. § 16(b) or other nonidentical residual clauses.[3] Hubbard counters that his burden is merely to show that it is plausible that the rule announced in Johnson renders § 16(b) unconstitutionally vague. In other words, he argues that the government is making a merits argument that

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[3] The government also argued elsewhere in its brief that the rule in Johnson does not apply to 18 U.S.C. § 924(c)(3)(B). We no longer need to address that argument directly because McNeal resolved the only relevant issue presented in this case (whether armed bank robbery is a crime of violence) that possibly involved that provision. We note, however, that the language of § 16(b) is identical to that in § 924(c)(3)(B), and we have previously treated precedent respecting one as controlling analysis of the other. United States v. Fuertes, 805 F.3d 485, 500 (4th Cir. 2015); see also United States v. Taylor, 814 F.3d 340, 377 (6th Cir. 2016) (relying on Supreme Court's § 16(b) precedent to interpret § 924(c)(3)(B)); United States v. Serafin, 562 F.3d 1105, 1108 & n.4 (10th Cir. 2009) (same).

would be properly presented to the district court in response to a § 2255 motion but that is premature at this preliminary stage.

As previously explained, § 16(b) defines a "crime of violence" as one that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." § 16(b). Like the provision invalidated by Johnson, § 16(b) is a residual clause expanding the definition of a crime of violence. However, the Court in Johnson was dealing with the ACCA's residual clause, which was formulated somewhat differently See Fuertes, 805 F.3d at 499 n.5 (explaining that "[t]he two formulations . . . are similarly worded but not identically so"). It stated that a crime was an appropriate predicate offense if it "otherwise involve[d] conduct that present[ed] a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). This textual difference, the government argues, combined with several other distinguishing characteristics, leaves § 16(b) beyond the scope of the rule articulated in Johnson. Specifically, the government argues that § 16(b) is "materially narrower" than the ACCA residual clause, that it does not contain a "confusing list of enumerated offenses," and that the ACCA residual clause reaches conduct occurring outside the commission of an offense while § 16(b) does not.

Given the relatively low bar Hubbard must get over, the government's arguments are unconvincing. Even accepting them all as undisputed, which they are not, it is not at all clear these arguments would be enough to show that Hubbard has failed to establish a prima facie case. All Hubbard need show is that there is "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2255(h)(2). In fact, it is not entirely clear which of these three § 2255(h)(2) elements the government contends Hubbard does not meet. The most plausible interpretation of the government's position is that Hubbard's present motion fails the third element—that the new rule was previously unavailable—not because the Johnson rule was previously available to him, but because the third § 2255(h)(2) element implies that a movant may only obtain authorization where the new rule becomes available to him insofar as it can affect his case. Thus, the government could be understood to argue, a plaintiff cannot proceed even from this early stage if the new constitutional rule cannot affect the provision on which his conviction or sentence was based. The argument fails here, however, because it is for the district court to determine whether the new rule extends to the movant's case, not for this court in this proceeding. In re Encinias, --- F.3d ----, 2016 WL 1719323 (10th Cir. Apr. 29, 2016) (per curiam); see also In

re Robinson, No. 16-11304-D, --- F.3d ----, 2016 WL 1583616, at *2 n.2 (11th Cir. Apr. 19, 2016) (Martin, J., concurring) (noting that every circuit except the Eleventh has held or assumed Johnson applies to the Sentencing Guidelines).

The government is making a merits argument: its contention that the Johnson rule does not render similar language in a closely related provision unconstitutional is an argument about the proper application of the new rule in Johnson. And at this stage, a merits argument faces an almost insurmountable hurdle: while determining whether to authorize a successive petition "may entail a cursory glance at the merits . . . the focus of the inquiry must always remain on the § 2244(b)(2) standards." Williams, 330 F.3d at 282; see also id. (noting that, for example, authorization to challenge a conviction for constitutional error will be granted where application "adequately alleging some constitutional violation" is presented (emphasis added)). The fact that two federal circuit courts already have concluded that § 16(b) is unconstitutionally vague under Johnson, see United States v. Vivas-Ceja, 808 F.3d 719, 720 (7th Cir. 2015); Dimaya v. Lynch, 803 F.3d 110 (9th Cir. 2015), likely is enough to establish that Hubbard has made "a sufficient showing of possible merit to warrant a fuller

exploration by the district court," Williams, 330 F.3d at 281.[4] In any event, that Hubbard has met this threshold burden is confirmed by our own "glance" at the government's merits arguments.

In Johnson, the Supreme Court found "[t]wo features of the [ACCA's] residual clause" problematic: that it "leaves grave uncertainty about how to estimate the risk posed by a crime" and that it "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." Johnson, 135 S. Ct. at 2557-58 (emphasis added) The first of these problems resulted largely from the ACCA residual clause's invocation of "a judicially imagined 'ordinary case' of a crime" rather than the "real-world facts or statutory elements." Id. at 2557. The Court noted that such an analysis put judges in an impossible

[4] We note that the circuits are divided as to whether § 16(b) and § 924(c)(3)(B) are unconstitutionally vague under Johnson. A panel of the Fifth Circuit agreed with the Seventh and Ninth Circuits that Johnson renders § 16(b) unconstitutionally vague, but the court has granted rehearing. United States v. Gonzalez-Longoria, 813 F.3d 225 (5th Cir. 2016), reh'g en banc ordered, 815 F.3d 189. The Sixth Circuit has concluded that § 924(c)(3)(B) is not unconstitutionally vague, Taylor, 814 F.3d at 376, completing (for now) the circuit split. We have previously declined (as unnecessary to the decision) to opine on whether Johnson's holding applies to the residual clauses embodied in those provisions, e.g., Fuertes, 805 F.3d at 499 n.5, and in the context of our consideration of Hubbard's motion for authorization to proceed in the district court, we have no occasion to rule on the merits of his claim beyond the "glance" discussed in text.

position: "How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves?" Id.; see also 18 U.S.C. § 924(e)(2)(B)(ii) (defining a violent felony as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another" (emphasis added)).

The second problematic feature of the ACCA residual clause, uncertainty regarding the quantum of risk necessary for a crime to become a violent felony, arises from two textual sources: the requirement that the "judge-imagined abstraction" of the ordinary case be analyzed using a vague "serious potential risk" standard, and the existence of a "confusing" enumerated list of exemplary offenses. Johnson, 135 S. Ct. at 2558. The Court indicated that a vague standard is one thing, but applying it to imaginary instances of crimes is another. Id. Moreover, the standard was made more vague by tying it to four enumerated offenses—burglary, arson, extortion, or any offense involving the use of explosives—which "are 'far from clear in respect to the degree of risk each poses.'" Id. (quoting Begay v. United States, 553 U.S. 137, 143 (2008)).

As Hubbard argues, § 16(b) presents both of these issues. It invokes the ordinary case by referring, not to the facts of the case, but to the "nature" of the offense. 18 U.S.C. § 16(b). The provision also applies almost the exact same vague standard—"involves a substantial risk"—to the abstract ordinary

case. Id. This Court has acknowledged the similarities between the "operative language" in the ACCA's residual clause struck down in Johnson and that in § 16(b) at issue here. See United States v. Martin, 215 F.3d 470, 474 n.4 (4th Cir. 2000). Only one of the problems with ACCA's residual clause is absent from § 16(b): the enumerated list of offenses. But while the Johnson Court noted that the list made the residual clause more vague rather than less so, its reliance on that issue was limited. See Vivas-Ceja, 808 F.3d at 723 ("The list [of enumerated offenses] itself wasn't one of the 'two features' that combined to make the clause unconstitutionally vague."). We cannot determine, at a glance, whether this single dissimilarity is sufficient to distinguish § 924(e)(2)(B)(ii) from § 16(b). It would therefore be for the district court to make that determination following a more detailed briefing of this merits issue.

The same is true of the government's other principal argument, namely, that § 16(b) is "materially narrower" than the ACCA provision. It is true that § 16(b) limits its application to instances involving the "risk that physical force" will be used "in the course of committing the offense," Leocal v. Ashcroft, 543 U.S. 1, 10 & n.7 (2004) (quoting § 16(b)), whereas the ACCA's residual clause reached risks precipitated by the offense but occurring after its completion, see Johnson, 135

S. Ct. at 2557. In fact, the Johnson Court noted that "the inclusion of burglary and extortion among the enumerated offenses preceding the [ACCA] residual clause confirms that the court's task also goes beyond evaluating the chances that the physical acts that make up the crime will injure someone" because violence related to those crimes is most likely to occur after the burglary or extortion has already been committed. Id. But this distinction between the ACCA residual clause and § 16(b), as presented by the government, goes more to the breadth of the two clauses than their vagueness.

The Johnson Court stated that its concern with the ACCA residual clause was that "unlike the part of the definition of a violent felony that asks whether the crime 'has as an element the use . . . of physical force,' the residual clause asks whether the crime 'involves conduct' that presents too much risk of physical injury." Id. (alteration in original). Likewise, § 16(b) eschews the reference to the elements of a crime found in the preceding § 16 force clause, 18 U.S.C. § 16(a), instead addressing itself to any crime that "involves a substantial risk that physical force against the person or property of another may be used," § 16(b). Although facts relevant to an ACCA analysis occupy a broader period of time, § 16(b) still asks courts to assess "the risk that the use of physical force against another might be required in committing a crime,"

Leocal, 543 U.S. at 10 (emphasis added), an exercise we cannot say at this stage does not "invite[] arbitrary enforcement by judges," Johnson, 135 S. Ct. at 2556.

Moreover, and perhaps paradoxically, it is largely the enumerated offenses in the ACCA which caused that residual clause's greater breadth. Johnson, 135 S. Ct. at 2557. As such, our reasons for rejecting the list of enumerated offenses as a sufficient point of distinction apply equally here. The Johnson Court's focus was on the abstraction involved in analyzing an ordinary case, and the distinction the government has raised between these provisions does not render it implausible that § 16(b), too, is unconstitutionally vague. Again, that is a merits argument that is sufficiently close to warrant presentation to the district court. In re Encinias, --- F.3d at ---, 2016 WL 1719323, at *1.

B.

The government's second argument is that the Sentencing Guidelines are procedural rules, that application of the Johnson rule to the Sentencing Guidelines would therefore be procedural, and that as a result Hubbard cannot satisfy the second § 2244 prima facie element (retroactive application) because, "[n]ew rules of constitutional criminal procedure are generally not applied retroactively on collateral review." United States v. Sanders, 247 F.3d 139, 147-48 (4th Cir. 2001) (citing Teague v.

Lane, 489 U.S. 288 (1989) (plurality opinion)). In other words, while it admits the Johnson rule is substantive when applied to § 924(c)(3)(B),[5] the government contends it is merely procedural when applied to the Sentencing Guidelines, and that retroactive application is therefore barred by Teague.

A rule is substantive if it addresses "'substantive categorical guarante[es] accorded by the Constitution,' such as a rule 'prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" Frazer v. South Carolina, 430 F.3d 696, 704 n.4 (4th Cir. 2005) (quoting Saffle v. Parks, 494 U.S. 484, 494 (1990)). "In contrast, rules that regulate only the manner of determining the defendant's culpability are procedural." Schriro v. Summerlin, 542 U.S. 348, 353 (2004). The government argues that § 16(b) as incorporated into the Sentencing Guidelines is procedural because (1) it does not change the range of legally permissible outcomes (which are limited by statutory minimums and maximums) and (2) errors in calculating a defendant's advisory guidelines range have been characterized as procedural by the Supreme Court. Neither argument is convincing.

To begin, the decision in Welch declared unequivocally that Johnson was "a substantive decision and so has retroactive

[5] See note 4, supra.

effect under Teague in cases on collateral review," Welch, 136 S. Ct. at 1265, and the government has cited no case to support the proposition that a rule can be substantive in one context but procedural in another. Cf. Danforth v. Minnesota, 552 U.S. 264, 266 (2008) ("New constitutional rules announced by this Court that place certain kinds of primary individual conduct beyond the power of the States to proscribe, as well as 'watershed' rules of criminal procedure, must be applied in all future trials, all cases pending on direct review, and all federal habeas corpus proceedings.").

The Welch Court also noted that "[b]y striking down the residual clause as void for vagueness, Johnson changed the substantive reach of the Armed Career Criminal Act, altering 'the range of conduct or the class of persons that the [Act] punishes.'" Welch, 136 S. Ct. at 1265 (quoting Schriro, 542 U.S. at 353). Likewise, striking down the residual clause embodied in § 16(b), and thereby removing it from the applicable version of the Sentencing Guidelines, would "alter[] the range of conduct or the class of persons that the [Sentencing Guidelines] punishes." Id. (quotation marks omitted). That is, the "substantive reach" of the Sentencing Guidelines would be altered just as much as was true for the ACCA. If the Johnson rule does invalidate § 16(b), some crimes will no longer fit the Sentencing Guidelines' definition of a crime of violence and

will therefore be incapable of resulting in a career-offender sentencing enhancement. In such cases, application of the Johnson rule will operate to "prohibit[] a certain category of punishment for a class of defendants because of their status." Frazer, 430 F.3d at 704 n.4. A defendant may still be subject to the same statutory range of punishments, but "'even the use of impeccable factfinding procedures could not legitimate' a sentence based on that clause" (that is, U.S.S.G. § 4B1.2(1) as it existed at the time of sentencing). Welch, 136 S. Ct. at 1265 (emphasis added) (quoting United States v. U.S. Coin & Currency, 401 U.S. 715, 724 (1971)).

Moreover, although available sentences are technically controlled by statute, the Sentencing Guidelines hardly represent a mere suggestion to courts about the proper sentences defendants should receive. "The federal system adopts procedural measures intended to make the Sentencing Guidelines the lodestone of sentencing." Peugh v. United States, 133 S. Ct 2072, 2084 (2013). This was even more true when Hubbard was sentenced in 1989 as United States v. Booker, 543 U.S. 220 (2005), had not yet been decided and the Sentencing Guidelines were still being treated as mandatory. The government points out that errors in calculating the appropriate Sentencing Guidelines range are procedural, Peugh, 133 S. Ct. at 2080, but fails to address the Supreme Court's express description of the

Sentencing Guidelines as "the substantive 'formula' used to calculate the applicable sentencing range," id. at 2088 (quoting Cal. Dep't of Corr. v. Morales, 514 U.S. 499, 505 (1995)) (quotation marks omitted); see also Molina-Martinez v. United States, 136 S. Ct. 1338, 1345 (2016) ("The Guidelines' central role in sentencing means that an error related to the Guidelines can be particularly serious.").

Just as in Johnson, invalidation of § 16(b) would have "nothing to do with the range of permissible methods a court might use to determine whether a defendant should be sentenced" as a career offender. Welch, 136 S. Ct. at 1265. The Welch Court noted that Johnson "did not, for example, allocate decisionmaking authority between judge and jury, or regulate the evidence that the court could consider in making its decision," and that it was therefore not procedural. Id. (citations and quotation marks omitted). The same would be equally true in an application of Johnson to the Sentencing Guidelines, and thus we are compelled to find that "[b]y the same logic, Johnson is not a procedural decision." Id.

IV

Because application of Johnson to § 16(b) as incorporated into the Sentencing Guidelines might render the career-offender residual clause that was applicable at the time Hubbard was

sentenced unconstitutional, and because the rule in Johnson is substantive with respect to its application to the Sentencing Guidelines and therefore applies retroactively, this Court grants Hubbard's request for authorization to file a successive § 2255 motion.

MOTION GRANTED

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
OCT 21 2016
OFFICE OF THE CLERK

No. 15-8544

In the Supreme Court of the United States

TRAVIS BECKLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* BY INVITATION OF THE COURT

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QUESTIONS PRESENTED

Johnson v. *United States*, 135 S. Ct. 2551 (2015), deemed unconstitutionally vague the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii) (defining "violent felony"). The residual clause invalidated in *Johnson* is identical to the residual clause in the career-offender provision of the United States Sentencing Guidelines, USSG § 4B1.2(a)(2).

The questions presented are:

1. Whether *Johnson* applies retroactively to collateral cases challenging federal sentences enhanced under the residual clause in USSG § 4B1.2(a)(2)?

2. Whether *Johnson*'s constitutional holding applies to the residual clause in USSG § 4B1.2(a)(2), thereby rendering challenges to sentences enhanced under it cognizable on collateral review?

3. Whether mere possession of a sawed-off shotgun, an offense listed as a "crime of violence" only in the commentary to USSG § 4B1.2, remains a "crime of violence" after *Johnson*?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Adam K. Mortara was appointed by the Court to brief and argue the second question presented in support of the judgment below. Court-appointed *amicus curiae* has taught federal courts, federal habeas corpus and criminal procedure at the University of Chicago Law School since 2007, and in that capacity supports the position the Court has instructed him to take. The arguments made herein are solely those of counsel and not necessarily the views of the University of Chicago Law School or its other faculty.

CONSTITUTIONAL, STATUTORY, AND SENTENCING GUIDELINES PROVISIONS INVOLVED

U.S. CONST. amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 3553(a) provides:

Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of

Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

United States Sentencing Guideline § 4B1.2(a) (Nov. 2015) provides:

Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

INTRODUCTION

The vagueness doctrine requires that laws punishing private conduct do so with sufficient clarity for the public and the prosecutors to know the score. The residual clause of the Armed Career Criminal Act mandated a heightened sentence upon a defendant meeting conditions the Court found vague and therefore failed this test. *Johnson* v. *United States*, 135 S. Ct. 2551 (2015).

Outside of the capital context, even a purely discretionary sentencing regime is unassailably constitutional. The addition of non-binding guidance to this *per se* constitutional foundation cannot reduce notice to defendants or increase arbitrariness. The advisory Guidelines are one such non-binding factor courts need to consider in exercising sentencing discretion. 18 U.S.C. § 3553(a). And while the Court's evolution of the *Booker* remedy has assigned modest weight to the advisory Guidelines as compared to other factors, that does not alter their advisory nature. The residual clause of the career offender guideline, § 4B1.2(a)(2), thus cannot be unconstitutionally vague. Only regulations of private conduct are subject to vagueness challenges.

To hold otherwise would cause significant harm. The Sentencing Commission is charged with determining whether a guideline is too problematic to administer in practice and whether any corrective amendment should be retroactive—*i.e.*, the practical analogues to the constitutional questions presented in this case. As to § 4B1.2(a)(2), the Commission has already answered, eliminating the residual clause and electing not to make that change retroactive. Permitting vagueness challenges

to existing and new guidelines will impede the important and expert work of the Commission, as well as its sister state sentencing commissions.

It is no answer for Beckles and the United States to point to the Court's decision in *Peugh* v. *United States*, 133 S. Ct. 2072 (2013). In contrast to the vagueness doctrine, the Court has interpreted the Ex Post Facto Clause to reach even non-binding changes—the "sufficient risk" of increased punishment test. This prophylactic test exists because Congress could otherwise abuse its power by retroactively discriminating against disfavored groups using indirect means—those not guaranteed to increase punishment but presenting a sufficient risk of doing so. That is why the Court held in *Peugh* that retroactive application of harsher guidelines—procured through a congressional request to the Commission—violated the Ex Post Facto Clause. While an ex post facto law (or even a guideline) can be a tool for impermissible legislative targeting of disfavored groups, a vague law evidences the absence of any such targeting. Thus, there is no "sufficient risk" test in the void-for-vagueness doctrine.

The advisory Guidelines cannot be unconstitutionally vague.

SUMMARY OF ARGUMENT

Non-binding guidelines do not implicate the twin concerns of the vagueness doctrine: (1) providing adequate notice of prohibited conduct and the punishment for it and (2) constraining arbitrary enforcement of the law. *Johnson*, 135 S. Ct. at 2556 ("[T]he Government violates [Due Process] by taking away someone's life, liberty, or prop-

erty under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.").

It is long-accepted that a pure discretionary sentencing regime (outside of the capital punishment context) is constitutional. *United States* v. *Booker*, 543 U.S. 220, 233 (2005) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."). In such a system, a defendant has no Due Process notice rights as to what specific sentence he might receive within the range set by the legislature, however broad. And while that sounds as if it might invite "arbitrary enforcement," it is constitutional because the exercise of sentencing discretion, properly understood, is not "enforcement."

If total discretion does not offend the Due Process Clause, then how can non-binding efforts to guide the exercise of that discretion transform what is constitutional into what is not? How do defendants get even less notice when guidance (however abstract or vague) is given than if sentencing judges are permitted to do as they please, for whatever reason? How is the potential for arbitrariness increased when guidance is provided, as compared to no guidance at all? The parties have yet to explain how the concerns of vagueness doctrine are more deeply felt in this case than the alternative of pure sentencing discretion—a fixed point of constitutionality.

While § 4B1.2(a)(2)'s residual clause shares the same text as the invalidated ACCA, the vagueness analysis differs because the legal effect of the words is different. Which is why, unlike with the ACCA, the Court has already held that the advisory Guidelines do not implicate

Due Process notice rights. *See Irizarry* v. *United States*, 553 U.S. 708, 714 (2008).

The other twin concern of vagueness, arbitrary enforcement, is merely the same problem viewed from the opposite side of the line that separates the Government from the People. It is hard to understand how a law that does not offend the Due Process Clause on notice grounds could nevertheless invite arbitrary enforcement. *See, e.g.*, *City of Chicago* v. *Morales*, 527 U.S. 41, 58-64 (1999) (plurality) (holding Chicago's gang loitering ordinance invalid on both grounds); *but cf. id.* at 65-69 (O'Connor, J., concurring in part and concurring in the judgment) (resting conclusion of unconstitutionality on arbitrary enforcement). The application of non-binding guidance to the foundation of *per se* constitutional discretionary sentencing does not implicate "arbitrary enforcement" because there is still discretion to act, or not. This is why the Court has upheld pure sentencing discretion in the non-capital context and struck down laws for vagueness only when they proscribe or punish private conduct.

The United States and Beckles take somewhat different approaches to escape the Court's vagueness case law, both of which are wrong. The United States wishes to thread an eyeless needle. On two consecutive pages it tells the Court the post-*Booker* Guidelines function as "advice" and are "therefore not substantive," but then that the "substantial effect that Guidelines advisory ranges exert" requires that vagueness challenges be permitted. *Compare* Resp. Br. 12 *with id.* at 13. If the effects are so substantial, the United States will be hard-pressed to explain how the *Booker* remedy actually remedied anything—for "any thumb on the scales" in favor of the Guidelines would

violate the Sixth Amendment. *Kimbrough* v. *United States*, 552 U.S. 85, 113 (2007) (Scalia, J., concurring).

Beckles, for his part, leads with *Peugh*. The Ex Post Facto Clause has been interpreted by this Court to reach retroactive changes that present a "sufficient risk" of an increased sentence. 133 S. Ct. at 2082. While both ex post facto and vagueness precedents discuss notice, the former is additionally concerned with retrospective legislative interference with newly disfavored groups. *Id.* at 2085 (plurality opinion). This is why the Court forbids ex post facto changes that merely pose a "sufficient risk" of increasing punishment, because legislatures can use indirect or imperfect means to target those disfavored groups. Not so with vague measures, which legislatively target no one. There is no "sufficient risk" halo around the vagueness doctrine and *Peugh* does not control here.

Where the parties agree, they make too much of too little. Both try to build momentum for their novel vagueness theory by reference to the number of circuit courts that have agreed with them. Pet. Br. 29 & n.7 (invoking the "majority view" that § 4B1.2(a)(2)'s residual clause is unconstitutionally vague); Resp. Br. 46 (noting that only the Eleventh Circuit has held that the advisory Guidelines cannot be unconstitutionally vague). But the United States conceded this issue and allowed those courts to proceed without the benefit of the adversary process. Opp. 15-16. When courts have heard only one side of the story, it should surprise no one when that side wins more often than not. *Cf.* James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 Yale L.J. 1346 & n.42 (2015) ("Indeed, the Supreme Court has

treated decisions rendered without full adversarial briefing as entitled to less precedential weight than decisions rendered on fully developed records.").

What is worthy of due consideration, however, are the diverse array of respected jurists concluding that the United States is wrong and the advisory Guidelines cannot be unconstitutionally vague. *See United States* v. *Hurlburt*, No. 14-3611, 2016 WL 4506717, at *8 (7th Cir. Aug. 29, 2016) (Hamilton, J., joined by Posner, Flaum, and Easterbrook, JJ., dissenting) ("[H]ow can non-binding advice be unconstitutionally vague?"); *United States* v. *Matchett*, No. 14-10396, 2016 WL 4757211, *1 (11th Cir. Sept. 13, 2016) (William Pryor, J., joined by Julie Carnes, J., respecting the denial of rehearing en banc) ("[T]he vagueness doctrine applies only to laws that regulate the primary conduct of private citizens."); *United States* v. *Lee*, 821 F.3d 1124, 1135 (9th Cir. 2016) (Ikuta, J., dissenting) ("[T]he discretionary Sentencing Guidelines do not raise the same constitutional concerns as mandatory sentencing provisions...."); *United States* v. *Gonzalez-Longoria*, No. 15-40041, 2016 WL 4169127, at *11 (5th Cir. Aug. 5, 2016) (Jones, J., joined by Smith, J., concurring) ("I would hold the Guidelines categorically immune from vagueness challenges."); *see also In re Embry*, 831 F.3d 377, 380 (6th Cir. 2016) (Sutton, J.) ("The answer to this ... question is not self-evident.").

Many of these rightly skeptical judges have noted that § 3553(a) instructs sentencing courts to consult their consciences as to "the seriousness of the offense," what "promote[s] respect for the law," and "protect[s] the public from further crimes of the defendant," as well as what would be "just punishment" and "adequate deterrence." 18 U.S.C. § 3553(a)(2). These provisions are no less vague

than the residual clause of § 4B1.2(a)(2) or other guidelines (state and federal) that will assuredly fall if this Court opens the door, to say nothing of future guidelines the Commission may wish to enact. Those future guidelines will become mired in constitutional challenges before the Commission even has a chance to assess how they are being implemented and deploy its expertise in making necessary adjustments.

Pragmatism and consideration for the special role of the Commission therefore counsel in favor of rejecting the parties' position. The Commission has the capability, the information, and the statutory responsibility to decide when the Guidelines should be changed, as it did in January of this year when it amended § 4B1.2(a)(2) to remove the residual clause. The Commission also has the power to make amendments that reduce suggested sentencing ranges retroactive, and decided not to do so when it eliminated the residual clause. Congress has charged an expert agency, partly composed of judges, to assess the impact and administrability of the Guidelines, as well as the retroactivity of any amendment. This Court should therefore exercise caution when acting to solve a problem that no longer exists, for "not every problem was meant to be solved by the United States Constitution." *Herrera* v. *Collins*, 506 U.S. 390, 428 n.* (1993) (Scalia, J., concurring).

The advisory Guidelines are not subject to vagueness challenges. The Court should affirm the judgment of the Eleventh Circuit.

ARGUMENT

I. THE ADVISORY SENTENCING GUIDELINES ARE NOT SUBJECT TO VAGUENESS CHALLENGES

If pure discretionary sentencing is constitutional, then so too is guided discretionary sentencing. It is not possible for an advisory Guideline, however abstract, to make sentencing more arbitrary or less predictable than a system of bare, unguided discretion. At worst, a vague Guideline has no effect at all. But the guideline at issue in this case is not a worst case. "Crime of violence" has meaning and there are at least some clear applications, as *Johnson* acknowledged.

Approaching the problem from the other direction, the advisory Guidelines are safe because only measures that regulate private conduct can be unconstitutionally vague. *Johnson*, 135 S. Ct. at 2556 ("Our cases establish that the Government violates [Due Process] by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement."); *see also* Cass R. Sunstein, *Problems with Rules*, 83 Cal. L. Rev. 953 (1995) ("[T]he 'void for vagueness' doctrine requires the state to set forth clear guidance before it may punish private conduct.").

The advisory Guidelines do not tell the public what is lawful and what is not or guarantee what sentence a defendant must receive. They cannot invite arbitrary enforcement—they are not in force. Because the advisory Guidelines do not dictate a criminal sentence, defendants have no Due Process expectation in a Guidelines range. To say otherwise would conflict with *Irizarry* and call into question the validity of other guidelines, the remaining

statutory factors set out in § 3553(a), the sentencing regimes of many states, and the constitutionality of the *Booker* remedy itself, as well as that of discretionary sentencing generally.

A. Because Pure Discretionary Sentencing Is Constitutional, So Is Guided Discretionary Sentencing

Prior to the Sentencing Reform Act of 1984 and the creation of the Commission and the Guidelines, pure discretionary sentencing (within a statutory range) was the norm. *See generally Matchett*, 2016 WL 4757211, at *2 (William Pryor, J., respecting the denial of en banc review). The Court has never questioned the constitutionality of giving judges such unbridled discretion outside of the capital punishment context. *Lockett* v. *Ohio*, 438 U.S. 586, 603 (1978) ("[L]egislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases"); *Booker*, 543 U.S. at 233 ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."); *compare Furman* v. *Georgia*, 408 U.S. 238, 257 (1972) (Douglas, J., concurring) (concluding that the pure discretionary capital sentencing violates the Eighth Amendment); *id.* at 310 (Stewart, J., concurring) (same); *id.* at 313 (White, J. concurring) (same).

The reason that discretionary sentencing does not invite "arbitrary enforcement" for purposes of the vagueness doctrine is that the exercise of discretion is not "enforcement." To conclude otherwise would render traditional sentencing unconstitutional—as what could be more arbitrary? *Hurlburt*, 2016 WL 4506717, at *12 (Hamilton, J., dissenting) ("Such unguided discretion would be the vaguest regime of all. Defendants would face

even greater uncertainty about potential sentences and even greater risk of arbitrary variation in sentences. Yet that is all perfectly constitutional."); *Matchett*, 2016 WL 4757211, at *5 (William Pryor, J., respecting the denial of rehearing en banc) (same).[1]

Section 4B1.2(a)(2), whatever its faults, does not make things worse. *Johnson* stated that there would be some "straightforward cases under the [ACCA] residual clause." 135 S. Ct. at 2560. Even if only those straightforward cases lead to clear guidance, § 4B1.2(a)(2) does not provide less notice or more arbitrariness in the remainder, because it binds sentencing courts in none of them. Discretionary sentencing, pure or guided, is not unconstitutionally vague because that discretion and non-binding guidance do not regulate private conduct. The Court's cases permit vagueness challenges only to such regulations.

B. Vagueness Doctrine Is Limited To Measures That Directly Regulate Private Conduct; This Court Has Never Held Otherwise

This Court's vagueness precedents have come close to this case only in the superficial sense that *Johnson* dealt with language identical to the residual clause of § 4B1.2(a)(2). This likeness is superficial because the legal

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[1] It is in this regard that Petitioner's *amici* have confused discretionary *judicial* sentencing (constitutional) with unfettered *prosecutorial* discretion (constitutionally problematic if the criminal law is vague). *See* Brief *Amicus Curiae* of Scholars of Criminal Law, Federal Courts, and Sentencing in Support of Petitioner 7-9 (arguing that judicial discretion in sentencing does not save the Guidelines because prosecutorial discretion to not charge certain persons under an unconstitutionally vague statute does not save that statute).

effect of the words matters. In *Johnson*, the words mandated a disjunctive sentencing range—with a new minimum higher than the previous maximum. Here the residual clause is meant to help judges employ their discretion. With or without the career offender Guidelines enhancement the lawful sentencing range remains the same. It is in this sense that *Johnson* comfortably fits within this Court's vagueness cases and a similar holding for § 4B1.2(a)(2) would not.

The lion's share of vagueness cases involves statutes or other laws that regulate private conduct by imposing criminal penalties. *See, e.g.*, *Morales*, 527 U.S. at 47; *Int'l Harvester Co. of Am.* v. *Kentucky*, 234 U.S. 216, 222 (1914) (Kentucky laws that simultaneously banned horizontal combinations and authorized combinations for tobacco producers, as interpreted by courts of that state); *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89-93 (1921) (federal statute criminalizing "unjust or unreasonable rate or charge in handling or dealing in or with any necessaries"); *Connally* v. *Gen. Const. Co.*, 269 U.S. 385, 393 (1926) (state law imposing fines and imprisonment for paying wages "less than the current rate of per diem wages in the locality where the work is performed" unconstitutional because "[t]he dividing line between what is lawful and unlawful cannot be left to conjecture."); *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 456 (1927) (criminal antitrust statute that generally banned combinations but then made lawful combinations for purposes of obtaining a "reasonable profit"); *Lanzetta* v. *New Jersey*, 306 U.S. 451, 458 (1939) (criminal statute criminalizing being a "gangster," defined further as a person "not engaged in any lawful occupation," "known to be a member of any

gang," and having certain prior convictions); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 156 n.1 (1972) (ordinance defining the offense of vagrancy as including "rogues and vagabonds ... common night walkers ... persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers ...."); *Smith* v. *Goguen*, 415 U.S. 566, 570 (1974) (criminal statute that prohibited, *inter alia*, "treat[ing] contemptuously the flag of the United States"); *Kolender* v. *Lawson*, 461 U.S. 352, 354 n.1 (1983) (criminal statute directed to those who "loiter[] or wander[] ... and refuse[] to identify" themselves).

Johnson would fit exactly within the above string cite if it were not for the continuing validity of *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998) (holding that recidivism sentencing facts are not subject to the Sixth Amendment jury trial right). Even with *Almendarez-Torres* still good law, it fits comfortably. The ACCA required a 15-year minimum sentence for those felons-in-possession where the additional element of three prior "violent felony" convictions was present. 18 U.S.C. § 924(e)(1). This defined a separate crime from the general felon-in-possession statute, 18 U.S.C. § 922(g), and its 10-year maximum sentence, 18 U.S.C. § 924(a)(2), with an additional fact-finding necessary for a disjunctive sentence. *Johnson*, 135 S. Ct. at 2555.

Where the void-for-vagueness doctrine has been applied outside of the criminal context, it is still in connection with regulation of private conduct. *See, e.g.*, *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030, 1033 (1991) (attorney regulation that prohibited "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or

reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding" with safe harbor for statements describing the "general nature of the ... defense"); *Keyishian* v. *Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 597, 599 (1967) (statutes requiring removal from state employment if employee makes "treasonable or seditious" utterances or acts, or "advocates, advises or teaches the doctrine" of forceful overthrow of the government); *F.C.C.* v. *Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2313 (2012) ("*Fox II*") (indecency policy, enunciated by FCC at direction of Congress, and enforced by the FCC against broadcasters). The common thread through all of these decisions is that measures were void because the public could not know what was proscribed. Concomitantly, the executive could take advantage of the confusion to arbitrarily do whatever it liked.

The advisory Guidelines do not purport to set any line between legal and illegal conduct or mandate a specific sentence. Once the superficial textual identity of § 4B1.2(a)(2) to the ACCA is put aside, Beckles and the United States have a difficult task to place their proposed extension of vagueness doctrine within the ambit of this Court's cases. Each takes a different approach, and both efforts fail.

Beckles and the United States rely on different authorities to justify their retooling of vagueness doctrine. Beckles focuses on *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966), *Gentile*, and *Fox II*. Pet. Br. 23-24. The United States makes its move with *Espinosa* v. *Florida*, 505 U.S. 1079 (1992) (per curiam). Resp. Br. 43-44. Beckles's cases just confirm that the Court has never found a non-binding measure unconstitutionally vague. And *Espinosa* is an

Eighth Amendment death penalty case, which says it all. For capital punishment, the Court has said that the Eighth Amendment will not tolerate the pure discretionary sentencing regime that is *per se* constitutional for non-capital sentencing. *Lockett*, 438 U.S. at 603. The United States is building its argument on the wrong foundation.

In *Giaccio*, the Court invalidated a Pennsylvania statute that empowered juries to award costs to the state even where a criminal defendant had been acquitted. While the statute on its face permitted this punishment for any reason, 382 U.S. at 403, judicial interpretation and the instructions in the specific case told the jury to award costs only if it found the defendant "guilty of some misconduct less than the offense which is charged ... [that] has given rise to the prosecution." *Id.* at 404. The statute granted an enforcement power to the jury to punish out-of-court conduct. That law, even with its judicial gloss, was unconstitutionally vague because it punished such an indiscernibly broad class of conduct and was not just an "administrative cost imposed upon all." *Schilb* v. *Kuebel*, 404 U.S. 357, 370 (1971) (distinguishing *Giaccio* on this basis). Beckles is wrong to say that *Giaccio* does not concern a "criminal statute prohibiting conduct or prescribing penalties." Pet. Br. 23.

Beckles's observation that the vagueness doctrine has applied to regulations of the bar in *Gentile* and regulations of broadcasters in *Fox II* in no way addresses the question of whether the unconstitutional measures in those cases regulated private conduct. In both, they did. In *Gentile* the Nevada Supreme Court restricted what lawyers could say, which is private conduct. 501 U.S. at 1033. In *Fox II* the FCC was both legislature and prosecutor, creating indecency guidelines and then enforcing

them against the broadcasters—*i.e.*, regulating what could and could not be broadcast, also private conduct. 132 S. Ct. at 2312-13. Beckles's argument amounts to: "Look, § 4B1.2(a)(2) is a regulation and vagueness doctrine has applied to regulations, so I win." But not all regulations define what is lawful and what is not. *Nyeholt* v. *Sec'y Of Veterans Affairs*, 298 F.3d 1350, 1357 (Fed. Cir. 2002) (upholding liver disability regulation that provided guidance to DVA medical examiners because "a void-for-vagueness challenge must be directed to a statute or regulation that purports to define the lawfulness or unlawfulness of speech or conduct"); *Woodruff* v. *U.S. Dep't of Labor*, 954 F.2d 634, 642 (11th Cir. 1992) (upholding interpretive rule in Federal Employees Compensation Act manual against vagueness challenge because it "does not attempt to guide conduct").

In *Espinosa*, the Court invalidated a death sentence because the jury had been instructed on a vague aggravating factor in rendering its decision. 505 U.S. at 1082. The Court decided that Florida's regime of permitting a judge and jury to each weigh aggravating and mitigating factors did not rescue the death sentence where the first decision-maker had been instructed on the invalid aggravator. *Id.* The United States relies on *Espinosa* because it purportedly shows that if a vague statute has even "indirect" effects it should be held unconstitutional. Resp. Br. 43. But the United States has lifted *Espinosa* from the Eighth Amendment capital punishment context, where the major premise for this case—pure discretionary sentencing is constitutional—does not operate. *See Furman*, 408 U.S. at 257 (Douglas, J., concurring) (concluding that pure discretionary capital sentencing violates the Eighth Amendment); *id.* at 310 (Stewart, J., concurring) (same);

id. at 313 (White, J., concurring) (same); *Godfrey* v. *Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion) (same); *see supra* 13-14. That alone makes *Espinosa* of no relevance.[2]

The Court's void-for-vagueness precedents do not stray from invalidating only measures that regulate private conduct. While the *Booker* remedy has evolved to anoint the advisory Guidelines first among equals with respect to the factors set out in § 3553(a), they are still advisory, do not regulate private conduct, and therefore cannot be unconstitutionally vague.

C. The Advisory Guidelines Do Not Regulate Private Conduct And Therefore Cannot Be Unconstitutionally Vague

Both Beckles and the United States make much of the role of the advisory Guidelines in sentencing today, a role which is the result of the Court's evolution of the *Booker* remedy. Pet. Br. 25; Resp. Br. 40-42. In fact, their position appears to depend on it, but still they offer no principle to determine when a non-binding measure becomes "binding enough" to risk being unconstitutionally vague.

There is a peculiar path-dependence to the parties' arguments. The Guidelines are the "essential framework,"

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[2] Aggravating factors today should be understood as elements of a separate offense of capital murder, subject to the *Apprendi* doctrine. *Ring* v. *Arizona*, 536 U.S. 584 (2002). In that sense a vague aggravating factor is the same thing as a vague element of a criminal offense. *Espinosa* is the product of an era where the Court grappled with the uniqueness it had imposed on capital sentencing, sometimes creating case law that only could be reconciled with non-capital cases in light of later developments. *See Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 110-112 (2003) (plurality opinion of Scalia, J.) (describing pre-*Ring* capital sentencing Double Jeopardy cases that had "tripped over the text of the Double Jeopardy Clause" as having been "illuminated" by *Apprendi* and *Ring*).

with a "central role" and a "real and pervasive effect," *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1345-46 (2016), not because of the *Booker* remedial opinion, which says none of these things, but because of the Court's subsequent cases further defining that remedy. With just *Booker* and the un-severed portions of the Sentencing Reform Act, the Guidelines range is just one of ten factors a district court must consider when sentencing.[3] 18 U.S.C. § 3553(a). Everything else the parties say about the role of the advisory Guidelines comes from the Court's later cases.

For starters, no particular sequence for consideration of the § 3553(a) factors is prescribed by the statute or the *Booker* remedial opinion, but the Court in *Gall* v. *United States*, 552 U.S. 38 (2007) decided that "[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Id.* at 49.[4] And even though *Booker* placed no specific emphasis on the Guidelines over any other factor in § 3553(a), the Court has also decided that failure to calculate a Guidelines range correctly can be plain error, *Molina-Martinez*, 136 S. Ct. at 1346, and that appellate

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[3] While there are only seven sub-clauses to § 3553(a), there are four separate considerations in § 3553(a)(2), and thus the total number of factors for a court to consider when imposing a sentence is ten.

[4] The authority cited for this mandatory order of operations was the Court's earlier decision in *Rita* v. *United States*, 551 U.S. 338, 351 (2007), wherein the majority only said that sentencing "will *normally* begin" with the Guidelines calculation. *Id.* (emphasis added). *Gall* also provided, in a footnote, the full list of advisory factors in § 3553(a), noted that the Guidelines were in the fourth clause, and then concluded that this "supports the premise that district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." 552 U.S. at 50 n.6.

courts are permitted to presume a within-Guidelines sentence is reasonable, *Rita*, 551 U.S. at 347.

The parties' reliance on this post-*Booker* structure raises the question of whether these refinements would exist had the vagueness argument presented itself first. In that sense, relying on judicially crafted additions to the *Booker* remedy—additions that find no home in the statutory text—is remarkable. Before concluding that the work of the Commission is void, this Court should consider the compatibility of these post-*Booker* decisions with additional alternatives that could obviate the concerns expressed by the parties.[5] This Court needs no reminder regarding the canon of constitutional avoidance. *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005). This case is even easier than the ordinary one where the canon is deployed. Here it is decisional law regarding the *Booker* remedy, not a statute, that the United States and Beckles say forces the constitutional issue—decisional law this Court is far more free to add to or revise than it is the words of a federal statute.

However, there is no need to revisit those precedents, because even under them the advisory Guidelines remain advisory—they do not regulate private conduct because

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[5] As just one example of how that might work, the Second Circuit permitted district courts, in the face of complex or close questions regarding the advisory Guidelines, to calculate two possible ranges and select either, or neither, of them based on the other factors in § 3553(a). *United States* v. *Crosby*, 397 F.3d 103, 112 (2d Cir. 2005). A simpler solution to the conundrum of § 4B1.2(a)(2) could hardly be imagined—calculate the range both ways and then decide, based on what Congress has said should be considered, which sentence best effectuates the remaining factors.

they do not dictate a defendant's sentence. As Judge Hamilton observed:

> [T]he definition in the advisory Sentencing Guidelines leads to no direct consequences of any kind. It simply gives the sentencing judge advice about an appropriate sentence. Unlike in statutory cases, the parties are free to argue that the Guidelines' advice about the defendant's criminal history is either too harsh or too lenient. The judge may accept the Guidelines' advice or reject it. In fact, the law *requires* the judge to treat the advice as only advice. A judge who presumes the Guidelines' advice produces a reasonable sentence commits reversible error.

Hurlburt, 2016 WL 4506717, at *9 (Hamilton, J., dissenting) (emphasis in original) (citing *Gall*, 552 U.S. at 50 and *Rita*, 551 U.S. at 351). A court can even reject the advisory Guidelines if it finds itself in a policy disagreement with them. *Kimbrough*, 552 U.S. at 109-11; *Spears* v. *United States*, 555 U.S. 261, 265-66 (2009) (per curiam).

The realities of sentencing under the advisory Guidelines confirm Judge Hamilton's point. The fraction of sentences within the Guidelines range has fallen steadily. Last year that proportion was only 47%. *See* U.S. Sentencing Commission, *2015 Sourcebook of Federal Sentencing Statistics* table N. By contrast, from December 11, 2007 to September 30, 2011 the percentage of defendants receiving a within-Guidelines sentence was 54%. United States Sentencing Commission, *Report on the Continuing Impact of* United States v. Booker *on Federal Sentencing* 5 (2012). For career offenders that percentage is even lower—only 28% of them received within-Guide-

lines sentences in 2014. U.S. Sentencing Commission, *Report to the Congress: Career Offender Sentencing Enhancements* 36 (2016).

In *Johnson*, the ACCA imposed a completely disjunctive sentence, with a new, higher, minimum of 15 years' imprisonment, and a new maximum of life imprisonment. 18 U.S.C. §§ 922(g), 924(a)(2), 924(e)(1). The career offender enhancement, by contrast, dictates nothing and resentencing without it can lawfully result in no change at all. This is particularly so given that courts are commanded to consider "history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1); *see Hurlburt*, 2016 WL 4506717, at *9 (Hamilton, J., dissenting) ("[I]n every case that is remanded the district court will be free to impose exactly the same sentence again. In fact the district courts probably *should* do so") (emphasis in original).[6]

It is for this reason that the Court concluded in *Irizarry* that there was no Due Process expectation in an advisory Guidelines sentencing range. *Irizarry* held that the constitutional notice concerns that had driven *Burns* v. *United States*, 501 U.S. 129, 138 (1991) were no more in light of *Booker*. In the pre-*Booker* binding Guidelines era, *Burns* identified a "serious" constitutional question about

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[6] A recent online essay by the author of an *amicus* brief in this case conducts a decidedly unscientific sampling of re-sentencing in the circuits that have invalidated § 4B1.2(a)(2) and concludes, from just eight examples, that the effect of invalidation has been significant. Leah M. Litman & Luke C. Beasley, *How the Sentencing Commission Does and Does Not Matter in* Beckles v. United States, 165 U. PA. L. REV. ONLINE 33, 38-39 (2016). This is hardly telling as to how re-sentencings would go generally, and in any event does not address the issue of whether the Guidelines regulate private conduct.

whether notice of upward departures was "mandated by the Due Process Clause." *Id.* To avoid this question, the Court construed Federal Rule of Criminal Procedure 32 to require such notice. *Id.* The rules were subsequently amended to reflect *Burns*. *See Irizarry*, 553 U.S. at 709.

When faced with the question of whether notice was required for a guidelines variance under *Booker* and the new Rule 32(h), *Irizarry* dispensed with the due process issue:

> Any expectation subject to due process protection at the time we decided *Burns* that a criminal defendant would receive a sentence within the presumptively applicable Guidelines range did not survive our decision in *United States* v. *Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005), which invalidated the mandatory features of the Guidelines. Now faced with advisory Guidelines, neither the Government nor the defendant may place the same degree of reliance on the type of "expectancy" that gave rise to a special need for notice in *Burns*.

Irizarry, 553 U.S. at 713-14. When the Guidelines had the "force and effect of laws," *Booker*, 543 U.S. at 234, Due Process demanded that notice be provided before a court deviated from the dictates of those mandatory Guidelines. After *Booker*, Due Process demands nothing regarding notice because a "judge may accept the Guidelines' advice or reject it." *Hurlburt*, 2016 WL 4506717, at *9 (Hamilton, J., dissenting).

The United States responds to *Irizarry* by saying that "[t]he problem with a vague guideline is not that it upsets an expectation that a defendant will receive a within-

Guidelines sentence." Resp. Br. 47.[7] No, instead the issue is that it becomes "impossible for courts and litigants to calculate the Guidelines range in a non-arbitrary manner." *Id.* 48. Why would a defendant want to calculate his Guidelines range except in the (constitutionally unprotected) expectation that it will allow him to learn his sentence or clues about it? And what Due Process interest does the Government (the other litigant) have in the calculation itself? (The Government does not have Due Process interests, and neither does the judiciary.) Finally, if it is true that a vague guideline leads to "sentences that depend in part on an inscrutably vague recommendation by the Sentencing Commission," *id.* 48, then that is a problem for all of the other § 3553(a) factors, which are equally "inscrutably vague." *See infra* at 30-32. *Irizarry* holds that there are no constitutional notice issues regarding the advisory Guidelines because they are advisory. Calling the advisory Guidelines a "legal text," Resp. Br. 42, whatever that means, does not make them law.

As earlier mentioned, the notice and arbitrary enforcement prongs of the vagueness doctrine reflect connected issues viewed from differing perspectives—respectively, the People and the Government. *Fox II*, 132 S. Ct. at 2317 ("[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do

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[7] Petitioner does not even cite *Irizarry*, which is curious given that it is one of the primary reasons judges have concluded that the advisory Guidelines are not subject to vagueness challenges. *See, e.g., Matchett*, 2016 WL 4757211, at *4 (William Pryor, J., respecting the denial of rehearing en banc); *Lee*, 821 F.3d at 1134 (Ikuta, J., dissenting).

not act in an arbitrary or discriminatory way."). Thus *Irizarry*'s notice holding presages the resolution of the question of arbitrary enforcement.

A measure cannot invite arbitrary enforcement when it does not purport to regulate private conduct, but is instead internally directed to another department of the government. *Nyeholt*, 298 F.3d at 1357; *Woodruff*, 954 F.2d at 642. Essentially, the parties wish to deconstruct the phrase "arbitrary enforcement" so that it applies when something looks "arbitrary" irrespective of whether there is "enforcement." Advisory sentencing factors are not to be "enforced," and can therefore be more abstract than a criminal statute. Considering how judges typically speak to one another and the tests courts are called upon to implement illustrates this point.

It is a constitutional truism that judges are equipped to deal with standards that, if they defined criminal offenses, would be void for vagueness. The Fourth Amendment forbids "unreasonable searches." U.S. CONST. amend. IV. The Court's case law nullifies state legislation that places an "undue burden" on access to abortion. *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2309, (2016). Closer to this case, § 3553(a) instructs judges to consider whether a sentence is "just punishment." 18 U.S.C. § 3553(a)(2)(A); *see infra* 30-33. To the public, these may be impossibly vague standards, but judges are made of sterner stuff in at least this regard. *Cf. also Doe ex rel. Doe* v. *Elmbrook Sch. Dist.*, 687 F.3d 840, 869 (7th Cir. 2012) (en banc) (Easterbrook, C.J., dissenting) ("If the current establishment-clause doctrine had been announced by Congress or an administrative agency, the Supreme Court would declare it unconstitutionally vague."). The Court's case law is not unconstitutionally vague and

neither is the Commission's advisory guidance to sentencing courts.

Finding no refuge in the Court's vagueness cases, the parties retreat to *Peugh*, which held that the advisory Guidelines were subject to the Ex Post Facto Clause. But the Ex Post Facto Clause addresses legislative vindictiveness with a distinct test, and *Peugh* does not control this case.

D. *Peugh* Does Not Control Here, Because The Ex Post Facto Clause Addresses Legislative Vindictiveness With A Distinct Test

Like the void-for-vagueness doctrine, the Ex Post Facto Clause is concerned with notice. *Weaver* v. *Graham*, 450 U.S. 24, 28-29 (1981) ("[T]he Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed"). But the Clause also addresses the danger of legislative vindictiveness, *id.* at 29, as well as "a fundamental fairness interest ... in having the government abide by the rules of law it establishes ...." *Carmell* v. *Texas*, 529 U.S. 513, 533 (2000). Because legislatures can act to target disfavored groups through indirect or imperfect means, the Court's touchstone for an ex post factor violation is "whether a given change in law presents a *sufficient risk* of increasing the measure of punishment attached to the covered crimes." *Peugh*, 133 S. Ct. at 2082 (internal quotation omitted) (emphasis added).

In *Peugh*, Congress had increased the statutory maximum penalties for fraud in the Sarbanes-Oxley Act. To effectuate this harsher punishment of fraudsters, it directed the Commission to reconsider whether its guidelines were appropriate, and the Commission obeyed.

Amendment 653 to the Sentencing Guidelines 4-5 (effective Nov. 1, 2003)[8]; *see also* Amendment 617 to the Sentencing Guidelines (effective Nov. 1, 2001) (implementing other amendments increasing guidelines ranges for fraud).[9] These amendments occurred after Peugh had committed his offenses. The question was whether he would be sentenced in consultation with the Guidelines as they were written when he committed his crimes, or the harsher Guidelines that Congress procured through its request to the Commission.

Peugh explained that even the advisory Guidelines' non-binding role in post-*Booker* sentencing ran afoul of the Court's Ex Post Facto Clause cases. 133 S. Ct. at 2084. Because the Court's post-*Booker* cases made them an "anchor," a "framework," and a "lodestone of sentencing," "[a] retrospective increase in the Guidelines range applicable to a defendant creates a *sufficient risk* of a higher sentence to constitute an *ex post facto* violation." *Id.* at 2083, 2084 (emphasis added).

There is no "sufficient risk" test in the void-for-vagueness doctrine, because there is no possibility of legislative targeting or vindictiveness with a law that is impermissibly vague. If the legislature wants to target a group for harsher treatment, it will identify the group with enough precision to make sure they are targeted—fraudsters, for example. That is why the sufficient risk test is arguably necessary in the ex post facto context but not here—it blocks Congress from accomplishing through a stacked deck or imperfect means what it also cannot do directly.

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[8] http://bit.ly/2dXGIs5 (last visited, October 21, 2016).

[9] http://bit.ly/2etjzAo (last visited, October 21, 2016).

By definition, a vague measure targets no one because no one knows what it means. Thus vagueness doctrine should be confined to actual regulations of private conduct, not shot into the universe of half-measures and non-binding standards that *might* affect a sentence.

The consequences of such a move are extreme. To hold that § 4B1.2(a)(2) is unconstitutionally vague would doom the other factors in § 3553(a) and similarly abstract provisions of the Guidelines, and raise the question of why there is not a "sufficient risk" test for the jury trial right—a threat to the *Booker* remedial opinion itself. Distinction-without-a-difference lawyering may permit the parties to wave off these problems, but the Court should not.

E. Applying The Vagueness Doctrine To § 4B1.2(a)(2) Calls Into Question The Other Advisory Sentencing Factors In § 3553(a), Other Guidelines, And Whether This Court's *Booker* Remedy Itself Complies With The Sixth Amendment

If the residual clause of § 4B1.2(a)(2) is hopelessly and unconstitutionally vague, then what will the courts do with the other non-binding sentencing factors in § 3553(a)? They instruct a court to "impose a sentence sufficient, but not greater than necessary" to: "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment," "afford adequate deterrence to criminal conduct," "protect the public from further crimes of the defendant," and "provide the defendant with needed ... correctional treatment." 18 U.S.C. § 3553(a)(2); *see Hurlburt*, 2016 WL 4506717, at *11 (Hamilton, J., dissenting) ("Section 3553(a)(2) tells judges in a vague and contradictory way to follow several conflicting theories of punishment at once...."). But that is not all. Courts are also instructed to consider six other factors, of which the

Guidelines range is one. 18 U.S.C. §§ 3553(a)(1), (3)-(7) (including "the nature and circumstances of the offense and the history and characteristics of the defendant"). Imposition of a sentence that is "sufficient, but not greater than necessary" to "promote respect for the law" by itself would be the sort of "impossible" endeavor the United States frets about. Resp. Br. 43.[10] And that is before considering the other potentially countervailing factors. It is a good thing, therefore, that these instructions are to guide judicial discretion and not to provide notice to the public, do not regulate private conduct, and are therefore not subject to the vagueness doctrine. Just as Congress spoke broadly in § 3553(a), and just as the Court sometimes enunciates standards for lower courts to follow in equally broad terms, *Doe*, 687 F.3d at 869 (Easterbrook, C.J., dissenting), the Commission should be permitted to do its work—using terms that if the Guidelines were statutes might be considered vague.

Should § 4B1.2(a)(2) fall, many other provisions of the Guidelines will share its fate. To name a few examples: The "vulnerable victim" enhancement, § 3A1.1, applies if the defendant knew or should have known that his victim was "unusually vulnerable due to age, physical or mental condition, or *who is otherwise particularly susceptible to the criminal conduct*." U.S. Sentencing Commission, Guidelines Manual, Application Note 2 (emphasis added).

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[10] The only possible distinction that the parties can draw between the other § 3553(a) factors and the Guidelines is the work of the Court in *Booker*'s progeny. But it cannot be the case that the Court itself transformed the Guidelines from something immune to vagueness challenges (like the other non-binding factors in § 3553(a)) into something so weighty that they can be unconstitutionally vague.

Hundreds of federal prisoners each year are sentenced by courts taking into account this advisory enhancement. U.S. Sentencing Commission Chapter 3 Adjustments 2015 2 (showing 516 such adjustments).[11] Other enhancements are similar. *See* USSG, § 3B1.1 (Nov. 2015) (an enhancement where the defendant was "an organizer or leader of a criminal activity that involved five or more participants *or was otherwise extensive*") (emphasis added); *id.* at § 3B1.3 (an enhancement if the defendant "abused a position of public or private trust" and defining that as a position "characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference)." It is no answer to distinguish these on the grounds that they are not subject to the categorical approach of the residual clause that the Court found so objectionable in *Johnson*. *See Hurlburt*, 2016 WL 4506717, at *7 (majority opinion). The laws in *Papachristou*, *Morales*, and *Connally*, did not require any categorical approach. *Johnson* did not establish it as the *sine qua non* of vagueness, and these other Guidelines, under the rule the parties advocate, are doomed.

Lastly, if the problem is how much of an "anchor," or "lodestone," the Guidelines are, then why does the guillotine of the vagueness doctrine fall but the Sixth Amendment jury trial right and Due Process right to proof of guilt beyond a reasonable doubt are still appeased? As Justice Scalia observed in *Kimbrough*, placing too much weight on the Guidelines means the *Booker* remedy remedied nothing at all. *Kimbrough*, 552 U.S. at 113 (Scalia, J., concurring); *see also Hurlburt*, 2016 WL 4506717, at *12 (Hamilton, J., dissenting) ("Why not allow some

[11] http://bit.ly/2etjlJI (last visited October 21, 2016).

vagueness in the Guidelines, whose advisory status is essential to avoid Sixth Amendment violations?"). How much weight is "too much" should not differ between the vagueness doctrine and the right to a trial by jury.

II. SUBJECTING THE GUIDELINES TO VAGUENESS CHALLENGES WILL INTERFERE WITH THE WORK OF THE COMMISSION AND WITH THE STATES THAT EMPLOY SIMILAR GUIDELINES

Permitting vagueness challenges to existing and new Guidelines threatens the work of the Commission and could wreak havoc on the states that use sentencing guidelines.

"Congress established the Commission to formulate and constantly refine national sentencing standards." *Kimbrough*, 552 U.S. at 108. Congress instructed the Commission to "review and revise [the Guidelines], in consideration of comments and data coming to its attention" in consultation with "various aspects of the Federal criminal justice system" including the Justice Department and the Federal Public Defender. 28 U.S.C. § 924(o). The Commission also has the power to make its amendments retroactive (if they relax sentences not if they increase them, per *Peugh*). *Dorsey* v. *United States*, 132 S. Ct. 2321, 2336 (2012) (citing 28 U.S.C. § 924(u)).

In other words, the Commission is charged with addressing the same questions that this Court is asking in this case, in substance if not in legal form—*i.e.*, is § 4B1.2(a)(2)'s residual clause still fit for its intended purpose and, if not, should an amendment eliminating it be retroactive? The difference between the ACCA and § 4B1.2(a)(2) is that, for the latter, the Commission "has the capacity courts lack to 'base its determinations on em-

pirical data and national experience, guided by a professional staff with appropriate expertise.'" *Kimbrough*, 552 U.S. at 109 (quoting *United States* v. *Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)). And the Commission has already made its decisions on these questions for the residual clause—eliminating it and not making that amendment retroactive. *See* U.S. Sentencing Commission, *Amendment to the Sentencing Guidelines* 2 (Jan. 21, 2016). In making that determination the Commission considered some of the same points that drove *Johnson*, but also all of the data it had collected regarding career-offender enhancements. *Id.* Vagueness challenges like this one are, in a fashion, an attempt to obtain judicial second-guessing of the Commission's expert decisions.[12]

In the future, if the Court rules in the parties' favor, every time the Commission enacts a new guideline that might remotely suggest a vagueness problem, defendants will challenge it out of the gate. The consequences are easy to predict—first to mind are circuit splits that this Court will have to resolve. More importantly, the Com-

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[12] The author of an *amicus* brief in this case attempts, in an online essay, to call into question the process by which the Commission made its decision against retroactivity. Litman & Beasley, 165 U. PA. L. REV. ONLINE 33 at 44-45 (noting that the Commission "opted not to investigate the possibility of making its amendment retroactive at all—a decision that appears to have been based on incomplete reasoning and supposition"). This unwarranted critique of the Commission denies the possibility that it already had the data and the expertise it needed to make a retroactivity decision without an additional investigation. The Commission's members, several of whom are federal judges, deserve more deference than their armchair critics have given them.

mission's ability to evaluate the effects of these new guidelines in practice will be substantially impaired if data collection is cut off by constitutional challenges. Just look at how quickly after *Johnson* (with the United States' enthusiastic cooperation, to be sure) courts found § 4B1.2(a)(2) unconstitutionally vague. It is not unrealistic to predict that the Commission may never be able to collect much data on a new standards-based guideline in certain fast-moving and sympathetic circuits. And if this Court imposes retroactivity as a necessary consequence of a vagueness finding, the Commission will be without the discretion to decide otherwise—as it did here.

That is not to mention the potential mischief that a vagueness finding here could work on the nearly twenty states that have similar sentencing guidelines. *See generally* Neal Kauder & Brian Ostrom, National Center for State Courts, *State Sentencing Guidelines: Profiles and Continuum* (2008).[13] For example, the Minnesota Sentencing Guidelines say that assessing prior convictions from outside of the state requires a sentencing court to "[f]ind the equivalent Minnesota offense based on the elements of the prior non-Minnesota offense." Minnesota Sentencing Guidelines Commission, *Minnesota Sentencing Guidelines and Commentary*, August 1, 2016 at 31. That endeavor sounds categorical, "equivalent" sounds vague, and this exercise could result in the very same issues that *Johnson* identified with the ACCA. Of course, Minnesota's guidelines are advisory.

And advisory guidelines cannot be unconstitutionally vague.

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[13] *See also* http://sentencing.umn.edu/jurisdictions (last visited Oct. 21, 2016).

CONCLUSION

The Court should hold that the advisory Sentencing Guidelines cannot be unconstitutionally vague, and on that basis should affirm the judgment of the court of appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TRAVIS BECKLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE FEDERAL PUBLIC AND COMMUNITY DEFENDERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the residual clause in U.S.S.G. § 4B1.2(a)(2) is void for vagueness in light of *Johnson*, thereby rendering Petitioner's challenge to his career offender sentence cognizable under 28 U.S.C. § 2255(a).

2. Whether *Johnson* has retroactive effect in this collateral proceeding.

3. Whether Petitioner's conviction for unlawful possession of a sawed-off shotgun, an offense listed as a "crime of violence" only in the commentary to U.S.S.G. § 4B1.2, qualifies as a "crime of violence" after *Johnson*.

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae, Federal Public and Community Defenders in the United States (not including the Defender representing the petitioner in this case), have offices in 91 of the 94 federal judicial districts. *Amicus curiae*, the National Association of Federal Defenders, formed in 1995, is a nationwide, non-profit, volunteer organization whose members are attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. *Amici* represent tens of thousands of individuals in federal court each year, including many who were previously sentenced under the residual clause of the Career Offender Guideline. *Amici* have particular expertise and interest in the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici write to place the issues in this case in broader context by discussing the history of the Career Offender Guideline, its impact on those to whom it has been applied and who remain in prison, and the implications of a ruling in Petitioner's favor on them and the federal criminal justice system.

Of the handful of most extreme punishments under federal law, the Career Offender Guideline has been applied most broadly. The courts have applied the

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[1] The parties to the case, and *amicus* appointed by the Court, have consented to the filing of this brief and copies of letters of consent have been lodged with the Clerk of the Court. Sup. Ct. R. 37.3(a). No counsel for a party authored any part of this brief, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

guideline expansively to reach relatively minor offenses under the vague language of the residual clause. The Commission has defined its predicates to reach conduct well beyond that specified or warranted by the congressional directive upon which it is based. For these reasons and others discussed below, the Career Offender Guideline has a severe disproportionate impact on African Americans, and fails to promote any purpose of sentencing in most cases in which it has been applied. At the same time, retroactive relief under ameliorating guideline amendments and changes in law has been foreclosed to many career offenders serving harsh prison terms. As a result of the extreme severity and sweeping breadth of the Career Offender Guideline, and the unavailability of relief, career offenders comprise over eleven percent of the federal prison population even though they are only about three percent of defendants sentenced each year.

For the persuasive reasons argued by Petitioner, *amici* urge the Court to hold that the residual clause in the Career Offender Guideline is void for vagueness in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), that *Johnson* applies retroactively to Career Offender Guidelines cases on collateral review, and that offenses listed in the guideline's commentary that conflict with its text absent the residual clause are invalid. Doing so will not unduly burden the courts. Now that the statute of limitations has run and motions have been filed, *amici* are able to estimate that at most 6,000 prisoners who were sentenced under the Career Offender Guideline are seeking retroactive relief under *Johnson*.[2]

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[2] App. at 9a-11a.

ARGUMENT

I. The Career Offender Guideline Creates a Particularly Severe Punishment That Has Been Applied To An Overly Broad Category of Defendants.

The Career Offender Guideline creates a "category of offender subject to particularly severe punishment." *Buford v. United States*, 532 U.S. 59, 60 (2001). Because Congress mandated that the Sentencing Commission specify a term of imprisonment at or near the statutory maximum, 28 U.S.C. § 994(h), the Commission's one attempt to ameliorate the severity of the guideline was held invalid. *See United States v. LaBonte*, 520 U.S. 751, 757 (1997). At the same time, the Commission has expanded the reach of the guideline beyond that required or warranted by § 994(h)'s plain language, and the courts have applied the guideline broadly under the vague language of the residual clause. Career offenders sentenced to harsh prison terms based on minor offenses have been unable to get relief under ameliorating guideline amendments or changes in law. While career offenders are just over three percent of defendants sentenced each year, they comprise over 11 percent of the federal prison population.[3]

A. The Guideline Is Harsh.

Congress mandated that the Commission "specify a sentence to a term of imprisonment at or near the maximum term authorized" for "categories of defendants" convicted for at least the third time of a "felony that is" a "crime of violence" or "an offense

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[3] U.S. Sent'g Comm'n, *Report to the Congress: Career Offender Sentencing Enhancements* 24 (2016).

described in" particular federal statutes prohibiting drug trafficking. *See* 28 U.S.C. § 994(h). The Commission implemented the level of punishment required by the directive by tying the offense level to the statutory maximum for the instant offense of conviction and automatically placing the defendant in Criminal History Category VI.[4]

Several additional features make being categorized as a career offender particularly harsh. Although the guideline regularly applies to low-level federal offenders with a criminal history produced by addiction and disadvantage,[5] the offense level may not be reduced for a minor or minimal role in the offense, and the Commission limited "departures" to one criminal history category for career offenders whose placement in the highest criminal history category overstates the

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[4] U.S.S.G. §4B1.1(a)-(b).

[5] *See, e.g.*, *United States v. Preacely*, 628 F.3d 72, 83-84 (2d Cir. 2010) (Lynch, J., concurring) (defendant's "sad, addicted life" produced a "history of multiple (if mostly minor) criminal convictions (almost exclusively tied to the possession and sale of narcotics)," so that "the only 'career' he ever had seems to have been selling drugs" and "earn[ing] an extraordinary sentence for a relatively mundane offense"); *United States v. Gavin*, 2008 WL 4418932 (E.D. Ark. Sept. 29, 2008) ("[D]efendant's criminal history [consisting of two crimes of violence] reflects criminal behavior consistent with a vagrant and substance abuser as opposed to a violent offender."); *United States v. Fernandez*, 436 F.Supp.2d 983, 990 (E.D. Wis. 2006) ("[T]he broad language will often sweep within the career offender guideline defendants with relatively minor records," such as fleeing, walk-away escape and car theft, "though they are likely not what Congress had in mind."); *United States v. Newhouse*, 919 F.Supp.2d 955, 991 (N.D. Iowa 2013) (defendant was "a long-term, chronic drug addict whose entire criminal history is tied to her addiction," whose "height of [] involvement in the drug trade has been as a low-level pill smurfer").

seriousness of their criminal history or their likelihood of re-offense.[6]

Moreover, the Career Offender Guideline not only *was* mandatory for over seventeen years, it was treated as mandatory long after *United States v. Booker*, 543 U.S. 220 (2005), and even after *Kimbrough v. United States*, 552 U.S. 85 (2007), and *Spears v. United States*, 555 U.S. 261 (2009). Four circuits expressly prohibited district courts from varying from the Career Offender range based on a policy disagreement,[7] and even in other circuits, some

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[6] *See* U.S.S.G. §4A1.3(b)(3)(A), p.s.; *id.* app. C, amend. 651 (Oct. 27, 2003).

[7] *See United States v. Green*, 436 F.3d 449, 459 (4th Cir. 2006) (holding that district court was "not free to ignore" Congress's policy judgment in § 994(h)); *United States v. Moreland*, 437 F.3d 424 (4th Cir. 2006) ("To the extent that the sentence imposed by the district court rests on [an outright] rejection of congressional policy with respect to repeat drug offenders, it is subject to reversal on that basis alone."); *United States v. Posey*, 294 F. App'x 765 (4th Cir. 2008) (later recognizing district courts may disagree with the career offender guideline); *United States v. Funk*, 534 F.3d 522, 530 (6th Cir. 2008) (district court erred by "impos[ing] his own policy determination [and] supplant[ing] that of the Sentencing Commission (and Congress)"), *vacated by* 560 F.3d 619, 619-20 (6th Cir. 2009) (appeal voluntarily dismissed by the government); *United States v. Michael*, 576 F.3d 323, 327-28 (6th Cir. 2009) (later holding that "district court may lawfully conclude that the policies underlying the career-offender provisions yield a sentence 'greater than necessary' to serve the objectives of sentencing"); *United States v. Welton*, 583 F.3d 494 (7th Cir. 2009) (prohibiting disagreement with career offender guideline), *overruled by United States v. Corner*, 598 F.3d 411, 415-16 (7th Cir. 2010) (en banc); *United States v. Williams*, 456 F.3d 1353, 1369-70 (11th Cir. 2006) (holding district court erred in mitigating a sentence based on its disagreement with "Congress's policy of targeting recidivist drug offenders for more severe punishment"); *United States v.*

district courts failed to recognize that the guideline was advisory for many years.[8]

For 46.3% of defendants sentenced as career offenders in 2014, the Career Offender Guideline increased the average guideline minimum by 260% (from 70 to 188 months); for 32.6%, it increased the average guideline minimum by 183% (from 92 to 168 months); for another 12.4%, it increased the average guideline minimum by about 25%.[9] And the Career Offender Guideline "exert[ed] controlling influence on the sentence[s]" imposed.[10] The average sentence imposed on career offenders was *2.3 times* that imposed on non-career offenders convicted of the same offense types.[11]

Moreover, it is exceedingly rare for a non-career offender to receive a sentence as severe as a career offender. Among career offender and non-career offenders convicted of the same offense types in 2014,

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Vazquez, 558 F.3d 1224, 1227-28 & n.2 (11th Cir. 2009) (reaffirming *Williams* after *Spears*), *vacated by Vazquez v. United States*, 558 U.S. 1144 (2010) (remanding for further consideration in light of Solicitor General's position).

[8] At sentencing in 2014, the district court "refus[ed] to vary downwardly because there was no 'Fifth Circuit guidance' related to variances when a defendant is subject to the career-offender provision." *United States v. Clay*, 787 F.3d 328, 330 (5th Cir. 2015). The Fifth Circuit held for the first time in 2015 that the "district court's sentencing discretion is no more burdened when a defendant is characterized as a career offender under §4B1.1 than it would be in other sentencing decisions." *Id.* at 331.

[9] *See* U.S. Sent'g Comm'n, *Quick Facts – Career Offender* (2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY14.pdf.

[10] *Peugh v. United States*, 133 S. Ct. 2072, 2085 (2013).

[11] App. at 2a.

only 1.2 percent of non-career offenders received a sentence as high as the guideline minimum for career offenders.[12] For firearms offenses, it was only 0.9 percent.[13]

At the same time, retroactive relief is not available for career offenders for a subsequent reduction in the guideline range for the underlying offense, and the Commission has prohibited retroactive relief even when the court departed or varied based on that range.[14] The Commission's prohibition overruled a majority of the courts of appeals,[15] and "closed the door of lenity on anyone who qualified for the career offender provision, regardless of how harsh the result."[16] And while the Commission recently made ameliorating changes to the definition of "crime of violence," it did not make those changes retroactive for reasons that would appear to preclude retroactivity for any narrowing of career offender predicates.[17]

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[12] *Id.* at 6a.

[13] *Id.*

[14] *See* U.S.S.G. §1B1.1, comment. (n.1(A)).

[15] *See United States v. Cardosa*, 606 F.3d 16, 21 (1st Cir. 2010); *United States v. Rivera*, 662 F.3d 166, 174, 177 (2d Cir. 2011); *United States v. McGee*, 553 F.3d 225, 227, 230 (2d Cir. 2009); *United States v. Flemming*, 617 F.3d 252, 259-60, 260-64 (3d Cir. 2010); *United States v. Munn*, 595 F.3d 183, 189-95 (4th Cir. 2010); *United States v. Wesson*, 583 F.3d 728, 732 (9th Cir. 2009); *United States v. Moore*, 541 F.3d 1323, 1329-30 (11th Cir. 2008).

[16] *United States v. Barr*, 132 F.Supp.3d 290, 295 (D.R.I. 2015).

[17] It was "difficult, if not impossible," to estimate the impact because Commission data does not include which criminal history events were used as predicates or under which definition they qualified. Remarks for Public Meeting, Chief Judge Patti B. Saris, Chair, U.S. Sent'g Comm'n, at 4 (Jan. 8, 2016),

B. Its Reach Is Broad.

The Commission has unnecessarily broadened the scope of the Career Offender Guideline, and the courts have applied it expansively under the vague language of the residual clause.

1. Controlled Substance Offenses

The Commission defined "controlled substance offense" more broadly than required or warranted. Congress directed the Commission to specify a term of imprisonment at or near the maximum for "categories of defendants" convicted of a "felony that *is* an offense described in" 21 U.S.C. §§ 841, 952(a), 955, 959, and 46 U.S.C. § 70503, and who were previously convicted of two or more prior "felonies, each of which *is*" one of those same federal offenses.[18] Nonetheless, the Commission included state drug offenses and a number of less serious federal drug offenses than those specified.[19] If Congress intended to include state drug offenses, it knew how to say so, *see*, *e.g.*, 18 U.S.C. § 924(e)(2)(A)(i) & (ii); 21 U.S.C. § 802(44); 8 U.S.C.

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http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160108/remarks.pdf.

[18] 28 U.S.C. § 994(h)(1)(B), (2)(B) (emphasis added).

[19] The following state and federal offenses were added to the drug offenses specified in § 994(h) from 1987 through 1997, and remain today: any state offense punishable by more than one year; aiding and abetting, attempt, conspiracy; "[u]nlawfully possessing a listed chemical with intent to manufacture a controlled substance," 21 U.S.C. § 841(c)(1); "[u]nlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance," 21 U.S.C. § 843(a)(6); "[m]aintaining any place for the purpose of facilitating a controlled substance offense," 21 U.S.C. § 856; and "[u]sing a communications facility in committing, causing or facilitating a drug offense," 21 U.S.C. § 843(b). *See* U.S.S.G. §4B1.2(b) & comment. (n.1) (Supp. 2016).

§ 1101(a)(43),[20] and "the precision with which § 994(h) includes certain [federal] drug offenses but excludes others indicates that the omission of § 846 [conspiracy] was no oversight."[21]

As a result of the Commission's expansion on Congress's directive, the Career Offender Guideline applies to a great many low-level drug sellers.[22] Indeed, drug trafficking is the most frequent prior conviction in career offender cases,[23] and is the instant

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[20] The Court recently held that when 8 U.S.C. § 1101(a)(43) states that "[t]he term 'aggravated felony' means an offense described in" a particular federal statute, it applies to violations of state statutes with the same substantive elements because the penultimat sentence of § 1101(a)(43) expressly says so. *See Torres v. Lynch*, 136 S. Ct. 1619, 1623 (2016). The career offender directive says no such thing, and moreover, says that the defendant must be convicted of a felony that "*is* an offense described in" the specified drug statutes.

[21] *United States v. Knox*, 573 F.3d 441, 448 (7th Cir. 2009).

[22] *See, e.g.*, *United States v. Moreland*, 568 F.Supp.2d 674, 687 (S.D. W. Va. 2008) (noting that distribution of one marijuana cigarette in 1992 and 6.92 g. crack in 1996 "hardly constitute the type and pattern of offenses that would indicate Mr. Moreland has made a career out of drug trafficking," and entire amount distributed in his lifetime "would rattle around in a matchbox").

[23] While the Commission does not collect data regarding the number or type of career offender predicates, a recent compilation of "criminal history events" of any kind for a sample of career offenders sentenced in 2014 showed that drug trafficking far outnumbered offenses that could be a "crime of violence" under any legal definition before or after *Johnson* or under the Commission's recently-amended definition. *See* U.S. Sent'g Comm'n, *Public Data Briefing: "Crime of Violence" and Related Issues* at slides 17, 19, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/COV_briefing.pdf.

offense in nearly three quarters of cases.[24] In response to decisions holding that it had impermissibly exceeded the terms of § 994(h),[25] the Commission amended the commentary to state that it had relied on its general amendment authority to "modif[y] this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid 'unwarranted sentencing disparities.'"[26] But the Commission later found that the Career Offender Guideline is *inappropriately* severe and creates *unwarranted disparities* for defendants who qualify based on drug crimes.[27]

2. Crimes of Violence

Congress had in mind for the Career Offender Guideline "repeat violent offenders,"[28] "a relatively small number of repeat offenders [who] are responsible for the bulk of the violent crime on our streets," *i.e.*,

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[24] *See* U.S. Sent'g Comm'n, *2014 Sourcebook of Federal Sentencing Statistics*, tbl. 22 (instant offense was drug trafficking for 73% of career offenders in 2014); *Career Offender Report*, *supra* note 3, at 24 (instant offense was drug trafficking for 74.1%, and selling drugs in a protected location for 1.6%, of career offenders in 2014).

[25] *See United States v. Price*, 990 F.2d 1367 (D.C. Cir. 1993); *United States v. Bellazerius*, 24 F.3d 698 (5th Cir. 1994), *United States v. Mendoza-Figueroa*, 28 F.3d 766 (8th Cir. 1994), *vacated*, 65 F.3d 691 (8th Cir. 1995) (en banc).

[26] U.S.S.G. app. C, amend. 528 (Nov. 1, 1995); *id.* §4B1.1, comment. (backg'd) (Nov. 1, 1995).

[27] *See* U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 133-34 (2004).

[28] S. Rep. No. 98-225, at 175 (1983).

those "who stab, shoot, mug, and rob."[29] But given the "hopeless indeterminacy" of the residual clause and its dependence on a "judge-imagined abstraction," *Johnson*, 135 S. Ct. at 2557-58, the courts interpreted the clause expansively. Contributing to the problem, the Commission issued commentary removing the link between the residual clause and the enumerated offenses.[30] Thus, defendants were classified as career offenders under the residual clause based on "crimes of violence" that involved no injury or serious risk of injury and no violent or aggressive conduct.[31]

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[29] 128 Cong. Rec. 26,517-18 (Sept. 30, 1982) (statement of Sen. Kennedy).

[30] From November 1, 1989 until August 1, 2016, the commentary stated that "crime of violence" includes offenses in which "the conduct set forth in the count of conviction by its nature, presented a serious potential risk of physical injury to another." U.S.S.G. §4B1.2, comment. (n.2) (2015). Courts relied on this commentary to hold that "conduct that presents a serious potential risk of physical injury to another" need not be similar in kind or degree of risk to the enumerated offenses. *See, e.g.*, *United States v. Parson*, 955 F.2d 858, 874-75 (3d Cir. 1992). When the problem was brought to the Commission's attention, *id.*, it acknowledged that the commentary had broadened the definition, such that "crimes not traditionally considered crimes of violence might qualify as a crime of violence under §4B1.2, but would not qualify as a crime of violence under § 924(e)," and proposed to fix it. *See* 58 Fed. Reg. 67,522, 67,533 (Dec. 21, 1993). With no explanation, it didn't.

[31] *See, e.g.*, *United States v. Moore*, 420 F.3d 1218, 1220-22 (10th Cir. 2005) (driving under the influence); *Parson*, 955 F.2d at 870-71 (reckless endangerment); *United States v. Fiore*, 983 F.2d 1, 4-5 (1st Cir. 1992) (conspiracy to break and enter a non-dwelling); *United States v. Rosas*, 410 F.3d 332, 334 (7th Cir. 2005) (fleeing and eluding); *United States v. Delaney*, 427 F.3d 1224 (9th Cir. 2005) (possession of short-barreled shotgun); *United States v. Sun Bear*, 307 F.3d 747, 752 (8th Cir. 2002) (attempted vehicle theft).

In *Begay*, the Court narrowed the breadth of the residual clause when it held that driving under the influence is not a "violent felony" because it does not involve the "purposeful, violent, and aggressive conduct" that the enumerated offenses "typically involve," *Begay v. United States*, 553 U.S. 137, 144-45 (2008). The Court then concluded in *Chambers* that an escape conviction based on a failure to report for service of sentence did not satisfy the ACCA's residual clause as interpreted by *Begay*, relying on a Commission report finding no failure to report cases involving violence. *Chambers v. United States*, 555 U.S. 122, 128-29 (2009).

Courts thereafter applied *Begay* to both the ACCA and the Career Offender Guideline to hold that many offenses previously held to be "crimes of violence" were not—including driving while intoxicated,[32] auto theft and auto tampering,[33] attempted vehicle theft,[34] non-residential burglary,[35] negligent burglary,[36] reckless assault without actual force,[37] spitting on a police officer[38] or a pregnant woman,[39] assault defined to include "unlawful touching, whether violent or

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[32] *United States v. Tiger*, 538 F.3d 1297 (10th Cir. 2008), *overruling United States v. Moore*, 420 F.3d 1218 (10th Cir. 2005).

[33] *United States v. Williams*, 537 F.3d 969 (8th Cir. 2008).

[34] *Sun Bear v. United States*, 611 F.3d 925, 928 (8th Cir. 2010), *vacated on other grounds*, 644 F.3d 700 (8th Cir. 2011) (en banc).

[35] *United States v. Giggey*, 551 F.3d 27 (1st Cir. 2008) (en banc).

[36] *United States v. Martin*, 753 F.3d 485, 493 (4th Cir. 2014).

[37] *United States v. McFalls*, 592 F.3d 707, 716 (6th Cir. 2010).

[38] *United States v. Carthorne*, 726 F.3d 503, 508 (4th Cir. 2013).

[39] *United States v. Evans*, 576 F.3d 766 (7th Cir. 2009).

nonviolent and no matter how slight" and encompassing reckless conduct,[40] failing to stop for a blue light,[41] statutory rape involving two teenagers,[42] sexual misconduct that may be committed by one teenager "kissing or fondling" another teenager,[43] starting a fire without intent to set fire to, burn, or damage property,[44] child endangerment under a statute allowing conviction for such passive behavior as leaving children unattended near an unfenced pond or with a physically abusive spouse,[45] involuntary manslaughter involving an accidental shooting of a close friend,[46] negligent vehicular homicide,[47] walkaway escape,[48] carrying a concealed weapon,[49] non-overt act conspiracy,[50] reckless endangerment,[51] and opposing or obstructing a police officer.[52]

But *Begay* and *Chambers* could not cure the intractable vagueness of the residual clause. Courts were still required to imagine in the abstract the degree of

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[40] *United States v. Royal*, 731 F.3d 333, 342 (4th Cir. 2013).

[41] *United States v. Rivers*, 595 F.3d 558 (4th Cir. 2010).

[42] *Spencer v. United States*, 773 F.3d 1132, 1136 (11th Cir. 2014) (en banc).

[43] *United States v. Goodpasture*, 595 F.3d 670 (7th Cir. 2010).

[44] *Brown v. Caraway*, 719 F.3d 583 (7th Cir. 2013).

[45] *United States v. Wilson*, 562 F.3d 965, 967 (8th Cir. 2009).

[46] *United States v. Peterson*, 629 F.3d 432, 434 (4th Cir. 2011).

[47] *United States v. Herrick*, 545 F.3d 53, 60 (1st Cir. 2008).

[48] *E.g.*, *United States v. Ford*, 560 F.3d 420 (6th Cir. 2009).

[49] *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008).

[50] *United States v. Whitson*, 597 F.3d 1218 (11th Cir. 2010).

[51] *United States v. High*, 576 F.3d 429, 430 (7th Cir. 2009); *United States v. Baker*, 559 F.3d 443, 454 (6th Cir. 2009).

[52] *United States v. Mosley*, 575 F.3d 603 (6th Cir. 2009).

risk posed by the "ordinary case," *Johnson*, 135 S. Ct. at 2559, and in doing so also followed the "ad hoc test[s]" from *James* and *Sykes*, *id.* at 2558—tests that themselves undermined any hope of tenable results.

In *James*, the Court held that attempted burglary is a violent felony under the ACCA because, it said, the risk posed by attempted burglary "is comparable" to the risk posed by completed burglary, its "closest analog" of the enumerated offenses. 550 U.S. 192, 203-04 (2007). The Court supported its conclusion with suppositions regarding the typical risk posed and with the assumption—mistaken, it turns out—that the Commission included attempt crimes in the Career Offender Guideline "based on [its] review of empirical sentencing data." *Id.* at 206 (citing §4B1.2, comment. (n.1)).[53]

In *Sykes*, the Court relied on "commonsense" that vehicular flight is a violent felony under the ACCA's residual clause, 564 U.S. 1, 10 (2011), even though the statute "covered everything from provoking a high-speed car chase to failing to stop immediately after seeing a police officer." *Johnson*, 135 S. Ct. at 2558-59. In the process, the Court suggested that courts had been overreading *Begay*'s "purposeful, violent and aggressive" test, *Sykes*, 564 U.S. at 12-13, which precipitated backtracking in some courts.

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[53] The Commission has now deleted "burglary of a dwelling" from the career offender guideline based on extensive empirical evidence demonstrating that "burglary offenses rarely result in physical violence." U.S.S.G. §4B1.2(a)(2) (Supp. 2016) (Reason for Amendment). Going forward, a prior burglary conviction may be used solely as a reason for upward departure, and even then only in the unusual case in which it involved physical injury. *Id.* §4B1.2 comment. (n.4).

The result was "pervasive disagreement about the nature of the inquiry [the court] is supposed to conduct and the kinds of factors [the court] is supposed to consider," *id.* at 2560, with courts free to guide their imaginations by mistaken assumptions, non-record statistics, Google searches, or "gut instinct," *id.* at 2557-58. Offenses that continued to qualify as "crimes of violence" after *Begay* and *Chambers* include pick-pocketing,[54] attempted larceny from a person,[55] theft of a firearm,[56] purse-snatching,[57] simple assault,[58] resisting arrest,[59] misdemeanor resisting arrest,[60] resisting arrest by fleeing,[61] simple vehicular flight encompassing failure to stop with no high speed,[62] trespass of habitation by stealth or deception,[63] trespass of a

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[54] *United States v. Jarmon*, 596 F.3d 228 (4th Cir. 2010) (statute criminalizing theft of over $5 in money or goods from another person).

[55] *United States v. Taylor*, 696 F.3d 628, 631 (6th Cir. 2012); *see also United States v. Alderman*, 601 F.3d 949, 953 (9th Cir. 2010) (theft from a person).

[56] *United States v. Schmidt*, 623 F.3d 257, 264 (5th Cir. 2010).

[57] *United States v. Hollins*, 514 F. App'x 264 (3d Cir. 2013); *see also United States v. Welch*, 683 F.3d 1304, 1313 (11th Cir. 2012) (robbery by sudden snatching).

[58] *United States v. Johnson*, 587 F.3d 203 (3d Cir. 2009).

[59] *United States v. Jenkins*, 631 F.3d 680 (4th Cir. 2011).

[60] *United States v. Stinson*, 592 F.3d 460 (3d Cir. 2010); *United States v. Almenas*, 553 F.3d 27, 34-35 (1st Cir. 2009).

[61] *United States v. Ellis*, 815 F.3d 419 (8th Cir. 2016).

[62] *United States v. Petite*, 703 F.3d 1290 (11th Cir. 2013).

[63] *United States v. Skipper*, 552 F.3d 489, 492-93 (6th Cir. 2009).

dwelling,[64] attempted burglary encompassing possession of burglary tools,[65] attempted burglary encompassing attempt to remove an air conditioner,[66] criminal trespass,[67] entering a public telephone booth to steal change from coin boxes,[68] organizing, taking part in, or inciting a hunger strike or other organized disobedience,[69] and fleeing by vehicle, including a bicycle, while obeying all traffic laws.[70]

Meanwhile, conflict reigned, as demonstrated by the disarray regarding whether mere possession of a firearm described in 26 U.S.C. § 5845(a) poses the requisite risk. In 2004, the Commission amended the guideline commentary to except unlawful possession of a firearm described in 26 U.S.C. § 5845(a) from the firearm-possession exclusion, because a number of courts at the time had held that possession of such a firearm satisfied the residual clause.[71] Thereafter, a number of courts of appeals held that it did *not* satisfy the identical residual clause in the ACCA. *See United States v. Miller*, 721 F.3d 435, 440 (7th Cir. 2013); *United States v. Amos*, 501 F.3d 524, 529 (6th Cir.

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[64] *United States v. Corner*, 588 F.3d 1130, 1134 (7th Cir. 2009), *overruled on other grounds*, 598 F.3d 411 (7th Cir. 2010) (en banc).

[65] *United States v. Martinez*, 602 F.3d 1166 (10th Cir. 2010).

[66] *United States v. Ghoston*, 530 F. App'x 468 (6th Cir. 2013) (relying on *United States v. Bureau*, 52 F.3d 584 (6th Cir. 1995).

[67] *United States v. Goodwin*, 625 F. App'x 840 (10th Cir. 2015).

[68] *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc).

[69] *United States v. Johnson*, 616 F.3d 85, 88 (2d Cir. 2010).

[70] *United States v. Hornyak*, 805 F.3d 196, 198 (5th Cir. 2015).

[71] U.S.S.G. app. C, amend. 674 (Nov. 1, 2004); *id.* §4B1.2, comment. (n.1) (Nov. 1, 2004).

2007); *United States v. McGill*, 618 F.3d 1273, 1279 (11th Cir. 2010); *United States v. Haste*, 292 F App'x 249, 250 (4th Cir. 2008). Others, such as the lower court in *Johnson*, disagreed.

C. Prisoners Sentenced To Harsh Prison Terms Based on Relatively Minor Offenses Have Been Unable to Get Relief.

The many people sentenced as career offenders based on minor crimes even after *Begay* and *Chambers* had no prospect of relief. Relief was foreclosed to many who would not have been sentenced as career offenders had they been sentenced after *Begay* and *Chambers*.[72] And many would not be career offenders under the Commission's new definition, which deletes the residual clause, eliminates "burglary of a dwelling," and narrows the definition of statutory rape and child sex abuse,[73] but the Commission did not make those changes retroactive.

II. The Career Offender Guideline Has An Unwarranted Adverse Impact on African Americans.

In the late 1980s, a wide gap opened up between the sentences of black defendants and those of other

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[72] Non-constitutional errors have been held not to present a cognizable miscarriage of justice in advisory guidelines cases, *see United States v. Foote*, 784 F.3d 931, 937-39 (4th Cir. 2015); *Spencer v. United States*, 773 F.3d 1132, 1144 (11th Cir. 2014); *Hawkins v. United States*, 706 F.3d 820, 822-24 (7th Cir. 2013), and in one circuit even in mandatory guidelines cases, *Sun Bear v. United States*, 644 F.3d 700, 704-06 (8th Cir. 2011) (en banc). *But see Narvaez v. United States*, 674 F.3d 621, 627-30 (7th Cir. 2011); *United States v. Doe*, 810 F.3d 132, 159-60 (3d Cir. 2015).

[73] U.S.S.G. §4B1.2(a)(2) & comment. (n.1) (Supp. 2016).

races.[74] The gap resulted from new statutes and guidelines, including the Career Offender Guideline, "that have a disproportionate impact on" black defendants but "serve no clear sentencing purpose."[75] As the Commission itself has said, "if a sentencing rule has a significant adverse impact and there is insufficient evidence that the rule is needed to achieve a statutory purpose of sentencing, then the rule might be considered unfair toward the affected group."[76]

From 1992 through 2014, black defendants comprised 32.7 percent of defendants convicted of the eight most common instant offense types eligible for career offender status, but they were 61.6 percent of such defendants sentenced as career offenders, and they are 65.8 percent of those defendants who likely remain in prison.[77] This severe disparity is unnecessary and unfair. It arises in large part from police practices that put African Americans at greater risk of conviction than similarly situated whites, and it promotes no relevant sentencing purpose even for convictions that do *not* result from unequal law enforcement.

A. Many Career Offender Predicates Reflect Disparate Policing Practices.

Though African Americans have been convicted of more career offender predicates than whites, this is not explained by racial differences in the commission

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[74] Paul J. Hofer, *The Commission Defends an Ailing Hypothesis: Does Judicial Discretion Increase Demographic Disparity?*, 25 Fed. Sent'g Rep. 311, 313 fig.1 (2013).

[75] *Fifteen Year Review*, *supra* note 27, at 131; *see also* Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. Pa. L. Rev. 1631, 1686-87 (2012).

[76] *Fifteen Year Review*, *supra* note, 27 at 114.

[77] App. at 9a.

of such offenses. Blacks comprised about 13% of the U.S. population in 2010.[78] They reported using an illicit drug in the past year at about the same rate as whites (16.8% and 15.3%, respectively[79]), and "there is also little evidence, when all drug types are considered, that blacks sell drugs more often than whites."[80] Blacks are about half as likely as whites to have a firearm in their homes.[81] Nonetheless, African Americans accounted for 39% of drug sale arrests and 41% of weapon possession arrests in 2010.[82]

The Career Offender Guideline's disproportionate impact on black defendants arises in large part from disparate state and local policing practices that result in black defendants having prior convictions for drug

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[78] U.S. Census Bureau, *Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States, States, and Counties: April 1, 2010 to July 1, 2015*, *available at* http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2014_PEPSR6H&prodType=table.

[79] Substance Abuse & Mental Health Servs. Admin., Results from the 2010 National Survey on Drug Use and Health, tbl. 1.19B, *available at* http://www.samhsa.gov/data/sites/default/files/NSDUHNationalFindingsResults2010-web/2k10ResultsTables/NSDUHTables2010R/HTM/Sect1peTabs1to46.htm.

[80] Nat'l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 60 (Jeremy Travis *et al.* eds., 2014).

[81] Rich Morin, Pew Research Center, *The Demographics and Politics of Gun-Owning Households* (July 15, 2014), www.pewresearch.org/fact-tank/2014/07/15/the-demographics-and-politics-of-gun-owning-households.

[82] Arrest rates for 2010 were obtained from the Bureau of Justice Statistics, Arrest Data Analysis Tool, *available at* http://www.bjs.gov/index.cfm?ty=datool&surl=/arrests/index.cfm#.

trafficking and many "crimes of violence" that they would otherwise not have, and that they would not have if they were white. This is also true of instant federal offenses, as many federal prosecutions originate with arrests by state and local police.[83] According to the National Research Council, extreme racial disparities in imprisonment have been "partly caused and substantially exacerbated" by police arrest practices associated with the "war on drugs," including racial profiling, and harsh sentencing laws and guidelines that apply disproportionately to black people, including three-strikes laws.[84]

Research from across the country shows that black drivers and pedestrians are stopped, frisked, searched and arrested far in excess of their portion of the population or their share of criminality. The use of racial profiling to stop, question and search black and brown drivers in an effort to find drugs, guns and cash originated in 1984 with "Operation Pipeline," a key initiative of the "war on drugs." Endorsed and financed by the Drug Enforcement Administration, thousands of state and local police officers were trained in its methods.[85] The practice became institutionalized in police departments across the country,

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[83] John F. Stinneford, *Subsidiarity, Federalism and Federal Prosecution of Street Crime*, 2 J. Catholic Soc. Thought 495, 507-09 (2005).

[84] Nat'l Research Council, *supra* note 80, at 70-71, 73, 91, 102-129.

[85] *See* Gary Webb, *Driving While Black: Tracking Unspoken Law-Enforcement Racism*, Esquire, Jan. 29, 2007, www.esquire.com/news-politics/a1223/driving-while-black-0499 (originally published as *DWB*, Esquire, Apr. 1999, at 118–127); *see also* David Kocieniewski, *New Jersey Argues That the U.S. Wrote the Book on Race Profiling*, N.Y. Times, Nov. 29, 2000, at A1.

and was adopted in some cities to stop and frisk pedestrians.[86]

The practice of targeting minorities for investigatory stops has been defended as an effective and efficient policing strategy on the theory that minorities are more likely to commit crime.[87] But this theory has been tested and disproved in studies across the nation. These studies, which analyze data recorded by police officers[88] and control for crime rates and other variables, consistently find that minorities are stopped, frisked, searched and arrested at disproportionately high rates, but that drugs, weapons and other contraband are found at significantly lower rates in frisks and searches of minorities than of whites.

For example, in Los Angeles, analysis of field data reports on pedestrian and motor vehicle stops from July 2003 through June 2004 revealed that the black stop rate per 10,000 residents was 3,400 stops higher

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[86] *See, e.g.*, Charles Epp & Steven Maynard-Moody, *Driving While Black*, Wash. Monthly, Jan. 1, 2014, at 14.

[87] *See* Robin Shepard Engel & Jennifer M. Calnon, *Examining the Influence of Drivers' Characteristics during Traffic Stops with Police: Results from a National Survey*, 21 Just. Q. 49, 50 (2004); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265, 294 (1999).

[88] In response to public attention and lawsuits, police in some jurisdictions are required to record the details of traffic and (sometimes) pedestrian stops, including the reason for the stop, the race of the person stopped, and (in some jurisdictions) the outcome. *See* Frank R. Baumgartner *et al.*, *Targeting Young Men of Color for Search and Arrest during Traffic Stops: Evidence from North Carolina, 2002–2013* at 5, Politics, Groups, & Identities (2016), http://dx.doi.org/10.1080/21565503.2016.1160413; Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risk of Driving While Black*, N.Y. Times, Oct. 25, 2015, at A1.

than the white stop rate, after controlling for crime rates in the reporting districts and a range of other variables.[89] Stopped blacks were 127% more likely to be frisked, 76% more likely to be searched, and 29% more likely to be arrested than stopped whites.[90] But frisked blacks were 42% less likely than frisked whites to be found with weapons, 25% less likely to be found with drugs, and 33% less likely to be found with other contraband. Searched blacks were 37% less likely than searched whites to be found with weapons, 24% less likely to be found with drugs, and 25% less likely to be found with other contraband.[91] The researchers concluded that it was thus "implausible that higher frisk and search rates are justified by higher minority criminality,"[92] and that if the same level of justification were used to search minorities and whites, fewer minorities would be searched, or proportionately more whites would be searched.[93]

Similar results are found in New York City. Based on analysis of 4.4 million documented pedestrian stops in New York City from 2004 through 2012, the court in *Floyd v. City of New York*, 959 F.Supp.2d 540 (S.D.N.Y. 2013) found that 52 percent of those stopped were black, 31 percent were Hispanic, and 10 percent were white, while the population was 23 percent black,

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[89] Ian Ayres & Jonathan Borowsky, *A Study of Racially Disparate Outcomes in the Los Angeles Police Department* 5-6 (2008), *available at* http://islandia.law.yale.edu/ayres/Ayres%20LAPD%20Report.pdf.

[90] *Id.* at 27.

[91] *Id.* at 7-8. Similar, but less extreme, results were found for Hispanics.

[92] *Id.* at 27.

[93] *Id.* at 23-24.

29 percent Hispanic, and 33 percent white.[94] A weapon was seized in one of every 71 stops of whites, 100 stops of blacks, and 91 stops of Hispanics; other contraband, including illegal drugs and stolen property, was seized in one of every 43 stops of whites, 56 stops of blacks, and 59 stops of Hispanics.[95] When the total number of stops declined by 22 percent in 2012, the disparity in "hit rates" was even more pronounced: a weapon was found in one of every 49 stops of whites, while it took 93 stops of blacks and 71 stops of Hispanics to find a weapon.[96] The court found that blacks and Hispanics were more likely to be stopped above and beyond the crime rate in a given area,[97] and that "blacks are likely targeted for stops based on a lesser degree of objectively founded suspicion than whites."[98]

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[94] *Floyd v. City of New York*, 959 F.Supp.2d 540, 559 (S.D.N.Y. 2013).

[95] *Id.*

[96] Office of the Public Advocate, City of New York, *Stop and Frisk and the Urgent Need for Meaningful Reforms* 1 (2013), *available at* http://archive.advocate.nyc.gov/stop-frisk.

[97] *Floyd*, 959 F.Supp.2d at 560.

[98] *Id.*

Data from North Carolina,[99] Kansas City,[100] Connecticut,[101] Illinois,[102] San Francisco,[103] and a national survey,[104] point to the same conclusion: Blacks, and to a lesser extent Hispanics, are disproportionately stopped, frisked, searched and arrested, but are found with contraband significantly less often than whites. Because police find contraband where they look for it, blacks are arrested and convicted in disproportionate numbers relative to similarly situated whites,[105] and "[p]olice profiling results in many more arrests of black people than would otherwise occur."[106] While some police departments are beginning to institute reforms,[107] even in "most of the states that monitor traffic stops most closely, officials

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[99] Baumgartner *et al.*, *supra* note 88.

[100] Epp & Maynard-Moody, *supra* note 86, at 14.

[101] Matthew B. Ross *et al.*, Inst. for Mun. & Reg'l Policy, Cent. Conn. State Univ., *State of Connecticut: Traffic Stop Data Analysis and Findings* iv, 73, 95, 108, 134, 161, 175 (2016), *available at* www.ccsu.edu/imrp/Publicatons/Files/May%202016%20Connecticut%20Racial%20Profiling%20Report.pdf.

[102] LaFraniere & Lehren, *supra* note 88.

[103] Office of the San Francisco Dist. Att'y, *Report of the Blue Ribbon Panel on Transparency, Accountability, & Fairness in Law Enforcement* 29-31 (2016), *available at* http://sfdistrictattorney.org/sites/default/files/Document/BRP_report.pdf.

[104] Engel & Calnon, *supra* note 87.

[105] Harris, *supra* note 87, at 297, 301-02.

[106] Nat'l Research Council, *supra* note 80, at 91 n.16.

[107] *See* All Things Considered: *To Reduce Bias, Some Police Departments Are Rethinking Traffic Stops* (NPR radio broadcast July 25, 2016), *transcript available at* http://www.npr.org/templates/transcript/transcript.php?storyId=486945181.

acknowledge that this close attention has not had a discernible effect."[108]

Another contributing factor is that in poor urban areas, the purchase and consumption of illegal drugs, and incidents like drunkenness and domestic disturbances are more likely to take place in public, whereas in suburban and more affluent urban areas, these activities are more likely to take place in private.[109] Residents of poor urban areas are thus "more exposed to police scrutiny and are more likely to be arrested than people residing in the suburbs or in wealthier urban neighborhoods."[110] However, there is evidence that police overlook criminality by whites when they see it. A study of indoor and outdoor drug markets in Seattle found that blacks were overrepresented in both outdoor and indoor arrests, with arrests of suspected black dealers outnumbering arrests of suspected white dealers by nearly two to one, and that significant outdoor drug activity that overwhelmingly involved whites appeared to be "largely invisible" to the police.[111]

The upshot is that African Americans appear in federal court with career offender predicates that they would likely not have if they were white. And it is reasonable to assume that many offenses that were

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[108] LaFraniere & Lehren, *supra* note 88.

[109] Nat'l Research Council, *supra* note 80, at 128.

[110] *Id.*; *see also Fifteen Year Review*, *supra* note 27, at 134 (noting the "relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished minority neighborhoods").

[111] Katherine Beckett *et al.*, *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 Criminology 105, 119, 122, 129-30 (2006).

"crimes of violence" only under the residual clause, such as resisting arrest,[112] carrying a concealed weapon, possessing certain kinds of weapons, driving under the influence, vehicular flight, and failure to stop for a blue light, also have resulted from greater scrutiny and more frequent contact with police.

B. The Career Offender Guideline Calls for Punishment That Is Excessive to Advance Any Purpose of Sentencing.

The only purposes of sentencing that the Career Offender Guideline might have been thought to promote are deterrence and incapacitation. But it is now well-established that increasing the severity of punishment does little, if anything, to deter crime.[113]

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[112] Studies show that blacks are arrested for the sole charge of resisting arrest significantly more often than whites. *See* Dep't of Justice, Civil Rights Div., *Investigation of the Ferguson Police Department* 65 (2015) (finding that the sole reason for 14 arrests following a traffic stop was resisting arrest and that the person arrested in each instance was black); *id.* at 67 (African Americans comprise 67% of Ferguson's population, but account for 92% of charges for resisting arrest); LaFraniere & Lehren, *supra* note 88 (traffic stop data from Greensboro, North Carolina, showed that more than four times as many blacks as whites were arrested on the sole charge of "resisting, obstructing or delaying an officer"); Emily Green, *Huge Racial Disparities in S.F Arrest Citations*, S.F. Chron., Apr. 29, 2015, at Metro A1 ("African Americans in San Francisco are cited for resisting arrest at a rate eight times greater than whites even when serious crimes are not involved, according to statistics drawn from court records.").

[113] *See* Nat'l Research Council, *supra* note 80 at 134-40, 337 (examining empirical studies and concluding that because the marginal deterrent effect of long sentences, if any, is so small and so far outweighed by the increased costs of incarceration, long sentences are "not an effective deterrent"); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 Crime & Justice 199,

As to the need for incapacitation, the Commission has consistently found that the ordinary criminal history rules are a good measure of the risk of recidivism,[114] but that the Career Offender Guideline is not.

In its initial evaluation of the predictive accuracy of the criminal history rules, the Commission found that each increase in the criminal history category (CHC) was associated with a statistically significant increase in the risk of recidivism, *except* the increase from CHC V to CHC VI. This was because "offenders sentenced under the career offender guideline (§4B1.1) and the armed career criminal guideline (§4B1.4) can be assigned to criminal history category VI, even if they have fewer than 13 criminal history points."[115] When recidivism was measured against criminal history points alone, all categories were significantly different from one another.[116] In a more recent evaluation, the Commission found that the rates of re-arrest and reconviction for career offenders and armed career criminals together were significantly lower than those rates for offenders in CHCs IV, V, and VI.[117]

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202 (2013) ("[L]engthy prison sentences cannot be justified on a deterrence-based, crime prevention basis.").

[114] *See* U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 8 (2004); U.S. Sent'g. Comm'n, *Recidivism Among Federal Offenders: A Comprehensive Overview* 18 (2016); *Career Offender Report*, *supra* note 3, at 6.

[115] *Measuring Recidivism*, *supra* note 114, at 9.

[116] *Id.*

[117] *See Comprehensive Overview*, *supra* note 114, at app. A-1, Rearrest Rates Across Selected Variables (Mar. 2016) (69.5% rearrest rate for "Career Offender/Armed Career Criminal," 74.7% for Criminal History Category IV, 77.8% for Criminal History Category V. and 80.1% for Criminal History Category VI)

The Commission has thus concluded that the automatic assignment of offenders to CHC VI under the Career Offender Guideline is not justified by their recidivism risk.[118] This makes sense, given the blanket, dramatic increases required by the Career Offender Guideline for prior offenses that meet its expansive definitions. The ordinary criminal history rules treat prior offenses more incrementally, and account for relevant differences among prior offenses, such as sentence duration, recency, and other details.[119]

Moreover, most career offenders not only are assigned to the highest criminal history category, but receive an increase in offense level tied to the statutory maximum. Because the offense level *prior* to this adjustment is designed to reflect the seriousness of the instant offense,[120] this increase can be justified only for the purpose of incapacitation. Yet, the Commission has found "no apparent relationship" between offense levels and recidivism risk.[121]

To date, the Commission has focused on how the inclusion of drug offenses as career offender predicates

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id. app. A-2, Reconviction Rates Across Selected Variables, (47.6% reconviction rate for "Career Offender/Armed Career Criminal," 51.6% for Criminal History Category IV, 56.6% for Criminal History Category V, and 59.3% for Criminal History Category VI).

[118] *Measuring Recidivism*, *supra* note 114, at 9.

[119] *See, e.g.*, U.S.S.G. §§4A1.1(a)-(c), 4A1.2(c)-(e).

[120] Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 62-67 (2003).

[121] *Measuring Recidivism*, *supra* note 114, at 13.

fails to identify defendants most in need of incapacitation. The Fifteen Year Review found that the recidivism rate for drug defendants who qualified for career offender status based on prior drug convictions was lower than other defendants in CHC VI.[122] Similarly, the Commission's most recent report concludes that the recidivism rate of career offenders qualifying based on drug offenses was similar to non-career offenders.[123]

The Commission has not addressed the rates or kinds of recidivism for offenses that qualify as "crimes of violence" under the residual clause. Its most recent study included all federal offenders who were released from prison or placed on probation in 2005, and 1,998 career offenders who were released from prison from 2004 through 2006. Based on the "instant offense" (for which they had served the federal prison sentence) and "prior arrests" (prior to the instant offense), career offenders were divided into three "pathways": (1) "drug trafficking only" if the instant offense was drug trafficking and they had two or more prior arrests for drug trafficking and no prior arrests for "violent offenses," (2) "mixed" if they had at least one "violent" and one drug trafficking event as either the instant offense or a prior arrest, or (3) "violent only" if the instant offense was "violent" and they had two or more prior arrests for "violent offenses" and no prior arrests for drug trafficking.[124] "Prior arrests," and "re-arrests" over an eight-year post-release follow-up period, were obtained from FBI RAP sheets.

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[122] *Fifteen Year Review*, *supra* note 27, at 134.

[123] *Career Offender Report*, *supra* note 3, at 40.

[124] *Id.* at 38-39.

These "pathways," however, were not based on any legal definition of "crime of violence," after *Begay*, after *Johnson*, or under the Commission's post-*Johnson* definition. Instead, an instant offense or arrest was counted as "violent" based on the Bureau of Justice Statistics' "violent offense" category,[125] which includes both first degree murder and vehicular manslaughter, forcible rape and statutory rape, robbery by force and purse snatching, aggravated assault and simple assault, and a variety of "other" offenses including illegal abortion and cruelty towards a child or wife.[126] As a result, the "mixed" and "violent only" categories include people who have never been arrested for a "crime of violence" as defined after *Begay*, after *Johnson*, or under the Commission's post-*Johnson* definition.

Notably, a number of offenses that have at some point been "crimes of violence" under the residual clause, such as escape, burglary, pickpocketing, motor vehicle theft, DUI, and unlawful possession of a weapon, were *not* counted as "violent."[127] Thus, the "drug trafficking only" category–with the lowest re-arrest rate[128]–includes people who *have* been arrested for offenses that were "crimes of violence" under the residual clause. Because the Bureau of Justice Statistics does not categorize weapons possession as violent, offenders like Mr. Beckles who were part of the study

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[125] *Id.* at 39.

[126] Matthew R. Durose *et al.*, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, at 22 (2014) (providing BJS definitions of "violent offenses").

[127] *Id.* at 22-23.

[128] *Career Offender Report*, *supra* note 3, at 40.

were "drug trafficking only" offenders, with the lowest recidivism rate.

Other aspects of the report are worth noting. The Commission used a broad definition of recidivism, defined as any re-arrest, including for alleged violations of probation or supervised release, and regardless of whether offenders were convicted of any crime.[129] Strikingly, the Commission did not report how many career offenders were in any of the three pathways, or the number or types of events for which they were arrested.[130] It did report that assault (including simple assault) was the "most frequent" "most serious" post-release event for both career offenders (24.9% of all recidivating events) and non-career offenders (23.3%).[131] In a previous study, the Commission found that violation of probation or supervised release conditions (38.3%) was the most common reason for re-arrest among offenders in CHC VI, followed by larceny (14.9%).[132] Re-arrest for a "serious violent felony"—homicide, kidnapping, robbery, sexual assault, aggravated assault, domestic

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[129] *Id.* at 39.

[130] The assertion in the "Current Sentencing Practices" part of the report, *id.* at 27-37, that 73.3% of career offenders sentenced in 2014 had at least one "violent offense" (60.6% "mixed," 12.7% "violent only"), *id.* at 28, is misleading. The Commission divided a sample of 449 defendants sentenced in 2014 into its three "pathways" based on all "criminal history events" listed in presentence reports, and counted them as "violent" based on a different list including many offenses that would not be "crimes of violence" under any past or present legal definition. *Id.* at 27 & n.39, 28 n.41. If legal definitions had been used, the "mixed" category would shrink significantly and the "drugs only" category would grow accordingly.

[131] *Id.* at 39-40.

[132] *Measuring Recidivism*, *supra* note 114, at 32 Ex.13.

violence, and weapons offenses—was relatively rare (12.5% of all recidivating events, committed by 7% of all CHC VI offenders).[133] Further, other Commission reports provide data on both re-arrest and re-conviction, and it makes a big difference. For example, the rate of re-arrest for those with 12 criminal history points like Mr. Beckles was 48.7%, but the rate of re-conviction was 14.0%.[134]

CONCLUSION

Mr. Beckles was deemed a career offender based on his offense of unlawful possession of a firearm in violation of 18 U.S.C. § 922(g), an unloaded sawed-off shotgun, and two prior state convictions for possession with intent to distribute cocaine. His case is in many ways typical of those subject to the harsh punishment delivered by the Career Offender Guideline. He was abandoned by his parents at age five, began using drugs and having legal problems at a young age, and was unable to read or write at the time of sentencing at age 24. J.A. 21. His prior record consisted of five state convictions for low-level possession with intent to sell cocaine, marijuana possession offenses for which adjudication was withheld, and a conviction for burglary of an unoccupied structure. *Id.* His instant offense arose from being approached by a Miami police detective who had no suspicion that he had committed a crime. The detective simply saw Mr. Beckles, a young black man, outside of a public housing project, decided to question him about where he lived, and exited his vehicle. Trial Tr. at 16, 25-26. Mr. Beckles fled to his girlfriend's apartment, with the detective in

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[133] *Id.* at 21 Ex.2 (55.2% were re-arrested); *id.* at 32 Ex.13 (12.5% were for "serious violent offenses").

[134] *Id.* at 23 Ex.4.

pursuit. *Id.* 17. After removing Mr. Beckles from the apartment and placing him in his police car, the detective asked the girlfriend if there were any drugs or guns in the apartment. *Id.* at 18-19. She said there was a gun, but the detective was unable to find it, so he brought Mr. Beckles back into the apartment, whereupon Mr. Beckles showed him the gun hidden beneath the mattress. *Id.* at 20. The gun was unloaded, and there was no ammunition in the apartment. *Id.* at 33.

The only career Mr. Beckles had was selling and using drugs. Like many others still in prison, he is serving a sentence under the Career Offender Guideline that the judge "*would not*" have imposed "but for the minimum offense levels assigned by the Sentencing Commission." J.A. 149. Their only hope of relief from its disproportionate and needless severity is for the Court to hold that *Johnson* applies retroactively to Career Offender Guideline cases.

Respectfully submitted,

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APPENDIX

APPENDIX A

CAREER OFFENDER DATA ANALYSES

Data Source and Methodology

The data used for these analyses were extracted from the U.S. Sentencing Commission's Fiscal Year 2014 Individual Offender Datafiles by Dr. Paul J. Hofer, Policy Analyst, Sentencing Resource Counsel Project, Federal Public and Community Defenders, and former Special Projects Director, U.S. Sentencing Commission.[1] Although these particular analyses have not been performed or published by the Commission, the underlying data are the same as the data used in the Commission's annual Sourcebook of Federal Sentencing Statistics. The data are publicly available at the Commission's website.[2] Using standard statistical software, such as SAS or SPSS, the Individual Offender Monitoring Datafiles can be used to perform a wide variety of analyses and generate tables and graphs beyond those published by the Commission.

Percentages are rounded to the nearest percent, or to the nearest tenth in cases of one percent or less.

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[1] For a description of the Datafiles, *see* U.S. Sent'g Comm'n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* app. D at 1 (2004).

[2] *See* Commission Datafiles, http://www.ussc.gov/research-and-publications/commission-datafiles.

I. Guideline Minimum, Average Sentence Imposed, Outside-Guideline Rates for Non-Career Offenders and Career Offenders By Instant Offense of Conviction[3]

For ease of reference, the results described below are collected in the following chart:

Instant Offense Type	All Major Offense Types		Drug Trafficking		Crimes of Violence		Firearms	
	Career Offender	Non-Career Offender	Career Offender	Non-Career Offender	Career Offender	Non-Career Offender	Career Offender	Non-Career Offender
Average Guideline Minimum	205 months	82 months	204 months	83 months	198 months	67 months	241 months	66 months
Average Sentence Imposed	149 months	66 months	138 months	61 months	176 months	70 months	216 months	74 months
Above Range	0.8%	2%	0.5%	1%	2.5%	4.2%	1.6%	4%
Below Range	73%	62%	77%	70%	57%	43%	64%	43%
	GS 46% NGS 26%	GS 38% NGS 24%	GS 49% NGS 28%	GS 46% NGS 24%	GS 35% NGS 22%	GS 20% NGS 23%	GS 40% NGS 24%	GS 19% NGS 23%

GS: Government-sponsored NGS: Non-government sponsored

A. The Eight Major Offense Types

Considering only the 2,186 career offenders and 28,770 non-career offenders convicted of the eight major offense types found among career offenders (murder, sexual abuse, assault, robbery, arson, drug trafficking, firearms, racketeering/extortion[4]), the average guideline minimum was 205 months for career offenders, and 82 months for non-career offenders.

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[3] The Commission Datafiles contain no information regarding the types of prior convictions upon which career offender status was based.

[4] *See* U.S. Sent'g Comm'n, *2014 Sourcebook of Federal Sentencing Statistics*, tbl.22.

The average sentence imposed was 149 months for career offenders, and 66 months for non-career offenders.

Sentences above the guideline range were imposed on 0.8 percent of career offenders, and on 2 percent of non-career offenders.

Sentences below the guideline range were imposed on 73 percent of career offenders (46 percent government sponsored and 26 percent not), and on 62 percent of non-career offenders (38 percent government sponsored and 24 percent not).

B. Drug Trafficking

Of the offenders for whom the Commission received complete information in FY2014, 21,257 offenders were sentenced primarily under the drug guidelines.[5] Of these, 1,702 were classified as career offenders, and 19,555 were not.

The average guideline minimum was 205 months for career offenders, and 83 months for non-career offenders.

The average sentence imposed was 138 months for career offenders, and 61 months for non-career offenders.

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[5] The primary sentencing guidelines are §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), or 2D2.1 (Simple Possession). These are the offenders described further in the Commission's 2014 Sourcebook of Federal Sentencing Statistics, tbls.33-45.

Sentences above the guideline range were imposed on 0.5 percent of career offenders, and on 1.0 percent of non-career offenders.

Sentences below the guideline range were imposed on 77 percent of career offenders (49 percent government sponsored and 28 percent not) and on 70 percent of non-career offenders (46 percent government sponsored and 24 percent not).

C. Crimes of Violence

Of the offenders for whom the Commission received complete information in FY2014, 9,668 offenders were convicted primarily under statutes for assault, robbery, firearms offenses, and racketeering/extortion.[6] Of these, 519 were classified as career offenders,[7] and 9,149 were not. The 519 career offenders are 98 percent of career offenders convicted of a crime of violence.

The average guideline minimum was 198 months for career offenders, and 67 months for non-career offenders.

The average sentence imposed was 176 months for career offenders, and 70 months for non-career offenders.[8]

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[6] These are the offenders categorized in these "primary offense categories" in the Commission's 2014 Sourcebook of Federal Sentencing Statistics, tbl.13.

[7] *See* U.S. Sent'g Comm'n, *2014 Sourcebook of Federal Sentencing Statistics*, tbl.22.

[8] For non-career offenders, the sentence imposed is higher than the guideline minimum due to mandatory minimums that in some cases trump the guideline range.

Sentences above the guideline range were imposed on 2.5 percent of career offenders, and on 4.2 percent of non-career offenders.

Sentences below the guideline range were imposed on 57 percent of career offenders (35 percent government sponsored and 22 percent not), and on 43 percent of non-career offenders (20 percent government sponsored and 23 percent not).

D. Firearms

Of the offenders for whom the Commission received complete information in FY2014, 7,419 offenders were convicted of a firearms primary offense.[9] Of these, 254 were classified as career offenders, and 7,165 were not.

The average guideline minimum was 241 months for career offenders, and 66 months for non-career offenders.

The average sentence imposed was 216 months for career offenders, and 74 months for non-career offenders.[10]

Sentences above the guideline range were imposed on 1.6 percent of career offenders, and on 4.0 percent of non-career offenders.

Sentences below the guideline range were imposed on 64 percent of career offenders (40 percent government sponsored and 24 percent not), and on 43 percent of non-career offenders (19 percent government sponsored and 23 percent not).

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[9] These are offenders with a "primary offense category" of firearms in the Commission's 2014 *Sourcebook of Federal Sentencing Statistics*, tbls.13, 22.

[10] For non-career offenders, the sentence imposed is higher than the guideline minimum due to mandatory minimums that in some cases trump the guideline range.

II. Percentage of Non-Career Offenders Who Received Sentences as High as the Guideline Minimum for Comparable Career Offenders

For ease of reference, the results described below are collected in the following chart:

Non-Career Offenders Who Received Sentences As High As the Career Offender Guideline Minimum	
Drug Trafficking + Crimes of Violence	1.2 percent
Drug Trafficking	0.5 percent
Crimes of Violence	2.8 percent
Firearms	0.9 percent

Analyses were performed to determine how often non-career offenders received upward departures or variances that increased the sentence imposed to a level at least as high as the guideline minimum for comparable career offenders.

Offenders were divided into comparable groups based on types of instant offenses and the cells of the Sentencing Table they were in prior to any upward departure or variance or any adjustment for career offender status. For example, non-career offenders with a guideline minimum of 57 months were compared to career offenders whose guideline minimum was also 57 months prior to the Chapter Four enhancement for career offender status. Final sentences for the non-career offenders were compared to the lowest minimum of the guideline range applicable to the career offenders following the career offender enhancement.

A. Drug Trafficking

The analyses were performed on the 192 non-career offenders who were sentenced above the guideline range, and the 1,552 career offenders whose career offender status increased their guideline range.

Sentences for non-career offenders were the same as or greater than the lowest career offenders' guideline minimum in 111 cases. This means that in just 0.5 percent of drug cases, offenders who did not receive career offender status received sentences at least as high as the lowest guideline minimum for comparable drug offenders who did receive career offender status.

B. Crimes of Violence

The analyses were performed using the 385 non-career offenders convicted primarily under statutes for assault, robbery, firearms offenses, and racketeering/ extortion who were sentenced above the guideline range, and the 456 career offenders convicted of those same offense types whose career offender status increased their guideline range.

Sentences for non-career offenders were the same as or greater than career offenders' guideline minimum in 271 cases. This means that in just 2.8 percent of these types of cases, offenders who did not receive career offender status received sentences at least as high as the lowest guideline minimum for comparable offenders who did receive career offender status.

C. Drug Trafficking and Crimes of Violence

The analyses were performed using the 577 non-career offenders in the offense types above who were sentenced above the guideline range, and the 2,008 career offenders in those same offense types whose career offender status increased their guideline range.

Sentences for non-career offenders were the same as or greater than the lowest career offenders' guideline minimum in 382 cases. This means that in just 1.2 percent of these types of cases, offenders who did not receive career offender status received sentences at least as high as the lowest guideline minimum for comparable offenders who did receive career offender status.

D. Firearms

The analyses were performed using the 284 non-career firearms offenders who were sentenced above the guideline range, and the 207 firearms career offenders whose career offender status increased their guideline range.

Sentences for non-career offenders were the same as or greater than career offenders' guideline minimum in 70 cases. This means that in just 0.9 percent of firearms cases, offenders who did not receive career offender status received sentences at least as high as the lowest guideline minimum for comparable offenders who did receive career offender status.

III. Race/Ethnicity of Career Offenders and Non-Career Offenders In Eight Most Common Career Offender Offense Types

Total Sentenced for Eight Most Common Offenses*

Race/Ethnicity	All Sentenced in FYs 1992-2014
White	29.2%
Black	32.7%
Hispanic	34.2%
Other	3.9%

All Sentenced in Fiscal Years 1992-2014 and Those Likely Still in Prison*

Career Offender Status	Race/Ethnicity	All Sentenced in FYs 1992-2014	Likely Still in Prison 2016
Career offender	White	22.4%	19.3%
	Black	61.6%	65.8%
	Hispanic	14.3%	13.3%
	Other	1.7%	1.6%
Non-career offender	White	29.6%	23.5%
	Black	30.9%	39.4%
	Hispanic	35.4%	33.6%
	Other	4.1%	3.6%

* Cases with full information; Data before 1992 not available; Includes offense types: murder, sexual assault, assault, robbery, arson, drug trafficking, firearms, racketeering/extortion, *see* U.S. Sent'g Comm'n, *2014 Sourcebook of Federal Sentencing Statistics*, tbl.22.

IV Number of Prisoners Seeking Collateral Review

Data from FY1992 (the earliest date for which the Commission has made data available) through FY2014 (the year before *Johnson v. United States*, 135 S. Ct. 2551 (2015) was decided) were used to estimate the number of offenders sentenced under the career offender guideline, and the number of those offenders

likely to remain in prison, by district and nationwide. The estimate of the number likely to remain in prison is necessarily imprecise, because it is based only on information available at the time of sentencing, including estimates of the prison time likely to be served by offenders, assuming they receive full good time credits. Information on re-sentencings, other possible post-sentencing reductions, and prison conduct that may affect good time credits is not available. Publicly available data also do not indicate the precise date of sentencing, only the fiscal year. Offenders who would be more than 70 years old today are excluded from the estimate.

Based on this information, about 39,953 offenders were sentenced under the career offender guideline from FY1992 through FY2014, and about 23,546 of those offenders are likely still in prison.

The number of prisoners who may be eligible for relief if *Johnson* is held to be retroactive is necessarily lower than the number of career offenders likely still in prison. The majority of career offender predicates are "controlled substance offenses,"[11] and many "crimes of violence" qualify under the enumerated offense clause or the elements clause.

After the statute of limitations passed, Federal Defender Offices were asked to report the number of

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[11] The Commission's Datafiles do not contain information regarding the types of prior convictions upon which career offender status was based, but the most common "criminal history event" for career offenders sentenced in fiscal year 2014 was drug trafficking. *See* U.S. Sent'g Comm'n, *Public Data Briefing: "Crime of Violence" and Related Issues* at slides 17, 19, available http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/COV_briefing.pdf.

28 U.S.C. § 2255 motions they had filed in career offender cases, but only if they had undertaken a thorough effort to file motions for as many people as appeared to be eligible for relief. For each of the responding districts, the number of motions filed was divided by the number of defendants sentenced under the career offender guideline in that district from FY1992 through FY2014 who are likely still in prison. The average was 25.6 percent. Taking 25.6 percent of the 23,546 career offenders likely still in prison nationwide, a maximum of 6,027 motions were filed. This overstates the number of motions filed by Federal Defender Offices, as many offices were unable to file any motions or as many motions as there are prisoners eligible for relief. At the same time, an unknown number of prisoners filed *pro se* motions. Nonetheless, we believe that 6,000 motions is a fair estimate, and likely overstates the number of motions filed, as it is based on data from Federal Defender Offices that filed motions for as many people as appeared to be eligible.

APPENDIX B

FEDERAL PUBLIC AND COMMUNITY DEFENDERS

Alabama, Northern
KEVIN BUTLER

Alabama, Middle
CHRISTINE FREEMAN

Alabama, Southern
CARLOS WILLIAMS

Alaska
FRED RICHARD CURTNER

Arizona
JON M. SANDS

Arkansas, Eastern
JENNIFFER MORRIS HORAN

Arkansas, Western
BRUCE EDDY

California, Central
HILARY POTASHNER

California, Eastern
HEATHER ERICA WILLIAMS

California, Northern
STEVEN GARY KALAR

California, Southern
REUBEN CAHN

Colorado
VIRGINIA L. GRADY

Connecticut
TERENCE S. WARD

Delaware
EDSON A. BOSTIC

District of Columbia
A. J. KRAMER

Florida, Middle
DONNA LEE ELM

Florida, Northern
RANDOLPH P. MURRELL

Georgia, Middle
CHRISTINA HUNT

Georgia, Northern
STEPHANIE KEARNS

Guam
JOHN T. GORMAN

Hawaii
PETER C. WOLFF, JR.

Idaho, Central and Northern
ANDREA GEORGE

Idaho, Southern
SAMUEL RICHARD RUBIN

Illinois, Central
THOMAS W PATTON

Illinois, Northern
CAROL BROOK

Illinois, Southern
PHILLIP J. KAVANAUGH

Indiana, Northern
JEROME T. FLYNN

Indiana, Southern
MONICA FOSTER

Iowa, Northern and Southern
JAMES F. WHALEN

Kansas
MELODY BRANNON

Kentucky, Western
SCOTT WENDELSDORF

Louisiana, Eastern
CLAUDE KELLY

Louisiana, Middle and Western
REBECCA L. HUDSMITH

Maine
DAVID BENEMAN

Maryland
JAMES WYDA

Massachusetts
MIRIAM CONRAD

Michigan, Eastern
MIRIAM L. SIEFER

Michigan, Western
SHARON TUREK

Minnesota
KATHERIAN D. ROE

Mississippi, Northern and Southern
SAMUEL DENNIS JOINER

Missouri, Eastern
LEE LAWLESS

Missouri, Western
MADELEINE CARDARELLA

Montana
ANTHONY R. GALLAGHER

Nebraska
DAVID STICKMAN

Nevada
RENE VALLADARES

New Hampshire
MIRIAM CONRAD

New Jersey
RICHARD COUGHLIN

New Mexico
STEPHEN P. MCCUE

New York, Eastern and Southern
DAVID PATTON

New York, Northern
LISA PEEBLES

New York, Western
MARIANNE MARIANO

North Carolina, Eastern
THOMAS P. MCNAMARA

North Carolina, Middle
LOUIS C. ALLEN III

North Carolina, Western
ROSS RICHARDSON

North and South Dakota
NEIL FULTON

Ohio, Northern
STEPHEN C. NEWMAN

Ohio, Southern
DEBORAH WILLIAMS

Oklahoma, Eastern and Northern
JULIA L. O'CONNELL

Oklahoma, Western
SUSAN M. OTTO

Oregon
LISA HAY

Pennsylvania, Eastern
LEIGH SKIPPER

Pennsylvania, Middle
JAMES V. WADE

Pennsylvania, Western
LISA B. FREELAND

Puerto Rico
ERIC A. VOS

Rhode Island
MIRIAM CONRAD

South Carolina
PARKS NOLAN SMALL

Tennessee, Eastern
ELIZABETH FORD

Tennessee, Middle
HENRY A. MARTIN

Tennessee, Western
DORIS RANDLE-HOLT

Texas, Eastern
G. PATRICK BLACK

Texas, Northern
JASON D. HAWKINS

Texas, Southern
MARJORIE A. MEYERS

Texas, Western
MAUREEN SCOTT FRANCO

Utah
KATHRYN N. NESTER

Vermont
MICHAEL L. DESAUTELS

Virgin Islands
OMODARE JUPITER

Virginia, Eastern
GEREMY KAMENS

Virginia, Western
LARRY W. SHELTON

Washington, Eastern
ANDREA GEORGE

Washington, Western
MICHAEL FILIPOVIC

West Virginia, Northern
BRIAN J. KORNBRATH

West Virginia, Southern
CHRISTIAN M. CAPECE

Wisconsin, Eastern and Western
DANIEL STILLER

Wyoming
VIRGINIA L. GRADY

RECORD AND BRIEFS

No. 15-8544

Supreme Court, U.S.
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AUG 18 2016
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In The
Supreme Court of the United States

TRAVIS BECKLES,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Appeals For The Eleventh Circuit

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QUESTIONS PRESENTED

1. Whether *Johnson* applies retroactively to collateral cases challenging federal sentences enhanced under the residual clause in U.S.S.G. § 4B1.2(a)(2).

2. Whether *Johnson*'s constitutional holding applies to the residual clause in U.S.S.G. § 4B1.2(a)(2), thereby rendering challenges to sentences enhanced under it cognizable on collateral review.

3. Whether mere possession of a sawed-off shotgun, an offense listed as a "crime of violence" only in the commentary to U.S.S.G. § 4B1.2, remains a "crime of violence" after *Johnson*.

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INTEREST OF AMICI CURIAE[1]

Amici are scholars of criminal law, federal courts, and sentencing. They take a professional interest in the application of the vagueness doctrine and retroactivity principles to decisions regarding criminal punishment. Amici have an important interest in this case because they are concerned that the court of appeals' decision misconstrues this Court's precedent and results in federal defendants serving unlawful sentences. More information about the specific interest of each scholar is provided below.

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[1] In accordance with Rule 37.6, Amici certify that no counsel for either party authored this brief in whole or in part, and no person or entity other than named amici made a monetary contribution for the preparation or submission of this brief. The parties have consented to the filing of this brief.

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SUMMARY OF ARGUMENT

The Due Process Clause's prohibition on vague criminal laws extends to the Federal Sentencing Guidelines. The Guidelines play an important, and often dispositive, role in federal sentencing. Judges must begin every sentencing by calculating the applicable Guidelines range; judges must consider that range when imposing sentence; any major deviations from that range must be supported by a compelling justification; and, on appeal, the reasonableness of the sentence imposed is judged in relation to the Guidelines range.

Vague Guidelines may result in arbitrary or discriminatory enforcement, and they fail to give the public sufficient notice regarding the grounds for sentencing enhancements. This Court has repeatedly applied the vagueness doctrine to laws that allow for the exercise of discretion; it is of no moment that judges currently have discretion to impose non-Guidelines sentences. Moreover, because both prosecutors and defendants have authority (and often a significant incentive) to appeal any perceived misapplication of § 4B1.2(a), the constitutional problems posed by vague Guidelines are implicated not only during district court sentencing proceedings, but also during

appellate proceedings that review a district court's efforts to properly apply the Guidelines.

A ruling that the residual clause of § 4B1.2(a) is unconstitutionally vague should be applied retroactively. New constitutional rules apply retroactively when they are substantive. A rule invalidating § 4B1.2(a)'s residual clause is substantive because it "alters the range of conduct or the class of persons that the law punishes." *Welch v. United States*, 136 S. Ct. 1257, 1264-65 (2016). A rule invalidating § 4B1.2(a)'s residual clause alters the class of persons who receive sentencing enhancements based on their criminal history.

Holding that a rule invalidating § 4B1.2(a)'s residual clause is retroactive also comports with this Court's recent decisions on retroactivity, as well as decisions that address the continued significance of the Guidelines. Finality interests do not counsel against making a ruling invalidating § 4B1.2(a)'s residual clause retroactive. The federal criminal justice system's recent experience with sentence reductions under amendments to drug-related Guidelines confirms that the system has the capacity to conduct resentencings in cases similar to Petitioner's.

At a minimum, this Court's ruling about the vagueness of § 4B1.2(a)'s residual clause should be made retroactive to defendants whose sentences were imposed when the Guidelines were not advisory. This includes not only defendants who were sentenced before the decision in *United States v. Booker*, 543 U.S.

220 (2005), but also defendants such as Petitioner, who were sentenced when district court judges were not permitted to disagree with § 4B1.2(a) on policy grounds.

Finally, in order to enhance nationwide consistency in processing similar cases and to enhance judicial efficiency and orderly administration, this Court should clarify that motions asserting the right recognized in this case are not time barred.

ARGUMENT

Petitioner was sentenced to 360 months of imprisonment, rather than 180 months, based on the residual clause of § 4B1.2(a) of the Federal Sentencing Guidelines. After Petitioner's conviction became final, this Court held that the residual clause of the Armed Career Criminal Act ("ACCA") was unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551 (2015). This Court subsequently held that the rule invalidating ACCA's residual clause applied retroactively. *Welch v. United States*, 136 S. Ct. 1257 (2016). The language from the ACCA that this Court held unconstitutionally vague is identical to the language in § 4B1.2(a)'s residual clause. Therefore, it should also be invalidated under the vagueness doctrine, and that ruling should be applied retroactively.

I. The Vagueness Doctrine Applies To The Federal Sentencing Guidelines

The Due Process Clause prohibits the enforcement of vague criminal laws. A criminal law is unconstitutionally vague "if it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015). The vagueness doctrine applies "not only to statutes defining elements of crimes, but also to statutes fixing sentences." *Id.* at 2557.

This Court has made clear that the vagueness doctrine applies not only to statutes, but also to regulations promulgated by agencies and other non-legislative bodies. *See, e.g.*, *FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2319 (2012) (finding unconstitutionally vague federal regulations); *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (finding Nevada Supreme Court Rule void for vagueness); *Boyce Motor Lines v. United States*, 342 U.S. 337, 338-40 (1952) (evaluating Interstate Commerce Commission regulation under the vagueness doctrine). Because the Guidelines "are the equivalent of legislative rules adopted by federal agencies," *Stinson v. United States*, 508 U.S. 36, 45 (1993), the vagueness doctrine applies to those rules. The Guidelines instruct judges regarding the amount of punishment to impose on a particular defendant. *See Peugh v. United States*, 133 S. Ct. 2072, 2085 (2013) ("The Sentencing Guidelines represent the Federal Government's authoritative view of the appropriate sentences for specific crime.").

That judges may, under certain circumstances, exercise discretion not to follow those rules is immaterial.[2] This Court has repeatedly applied the vagueness doctrine to rules that allow for the exercise of discretion. In *Coates v. City of Cincinnati*, 402 U.S. 611, 611 (1971), this Court struck down an ordinance making it a crime for persons to gather on the sidewalk and "conduct themselves in a manner annoying to persons passing by," even though police officers retained discretion not to arrest individuals whom they found annoying. And in *Kolender v. Lawson*, 461 U.S. 352, 353-54 (1983), this Court applied the vagueness doctrine to a

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[2] The precise scope of this discretion is unsettled. District courts doubtlessly possess discretion to sentence outside of the Guidelines range when a defendant differs from the defendant in a mine-run case or when the U.S. Sentencing Commission has itself indicated that certain Guidelines often produce sentences "greater than necessary" in light of the purposes of sentencing set forth in 18 U.S.C. § 3553(a). *See Kimbrough v. United States*, 552 U.S. 85, 109-110 (2007). Whether, and how much, discretion judges have to sentence outside of the Guidelines range based only on their policy views remains unclear. *See Peugh v. United States*, 133 S. Ct. 2072, 2080 n.2 (2013). The circuits have reached different conclusions on this issue. *Compare United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010) (permitting policy disagreement with child pornography Guideline) *with United States v. Bistline*, 665 F.3d 758 (6th Cir. 2012) (suggesting policy disagreement with child pornography Guideline is inappropriate).

But this Court need not resolve the scope of district courts' sentencing discretion in order to conclude that the vagueness doctrine applies to the Guidelines. The existence of discretion is immaterial to whether a legal rule is unconstitutionally vague. The relevant question is whether the rule sets either criminal liability or punishment.

statute despite evidence that prosecutors regularly exercised their discretion not to bring charges under the statute.[3] This Court applied the vagueness doctrine in order to protect the due process rights of individuals who were arrested and charged under those laws, even though some other individuals benefited from exercises of discretion which enabled them to avoid the formal legal consequences of being directly subject to unconstitutionally vague provisions.

The application of the vagueness doctrine to the Guidelines similarly protects due process rights – the rights of those individuals whose sentences were increased under § 4B1.2(a)(2)'s residual clause. It is immaterial that some judges in some cases may exercise their discretion to impose sentences that do not fall within the range specified by § 4B1.2(a)(2).

The rationales underlying the vagueness doctrine – preventing arbitrary and discriminatory enforcement and providing adequate notice – squarely apply to the Guidelines. Vague Guidelines present a risk of arbitrary and discriminatory enforcement. Like a vague statute, a vague Guideline "delegates basic policy matters" regarding how a defendant should be punished to "judges . . . for resolution on an ad hoc and subjective basis." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

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[3] The appellee was detained or arrested fifteen times under the vague statute, but he was prosecuted only twice. 461 U.S. at 354.

Section 4B1.2(a)(2) uses language that is identical to the language from the Armed Career Criminal Act that this Court declared unconstitutionally vague in *Johnson*. *See Johnson*, 135 S. Ct. at 2557 ("[T]he indeterminacy of the wide-ranging inquiry required by the residual clause . . . invites arbitrary enforcement by judges."). The Guidelines' language accordingly presents comparable threats of arbitrary enforcement. Consider a judge who (perhaps unconsciously) dislikes a particular defendant because he opted to exercise his right to a trial despite having no viable defense and a significant criminal history. Instead of exercising her discretion to vary from the Sentencing Guidelines and impose an above-Guidelines sentence, the judge could instead apply § 4B1.2(a)(2)'s residual clause in order to ensure that the sentencing range specified by the Guidelines is much higher. A sentence that is consistent with the Sentencing Guidelines is more likely to be upheld on appeal than a sentence that is outside of the Guidelines range. *Rita v. United States*, 551 U.S. 338, 347 (2007). Indeed, several circuits have adopted a presumption of reasonableness for within-Guidelines sentences. But even in circuits without such a presumption, a within-Guidelines sentence is more likely to be affirmed because it complies with the procedural requirements of *United States v. Booker*, 543 U.S. 220 (2005), *see Gall v. United States*, 552 U.S. 38, 49-51 (2007), and because the Guidelines range shapes substantive reasonableness review on appeal, *see Peugh*, 133 S. Ct. at 2083 (noting that the Guidelines "remain a meaningful benchmark through the process of appellate review"). As a result, the vagueness of

§ 4B1.2(a)(2)'s residual clause makes a higher sentence based on arbitrary or discriminatory criteria more likely to be upheld on appeal.

Nor is the potential for abuse limited to sentencing judges. Probation officers prepare presentence reports that recommend an applicable Guidelines range. Probation officers, like judges, could opt to increase sentences of disfavored defendants. For example, if a defendant behaved rudely toward a probation officer during the presentence interview, the probation officer could seek to retaliate against the defendant by recommending that § 4B1.2(a)(2) apply. Even if the sentencing judge exercised her discretion to impose a below-Guidelines sentence, that would not cure the harm resulting from the discriminatory enforcement at the probation officer's hands (especially if a prosecutor thereafter sought to appeal the sentence as unreasonable because it fell significantly below the sentencing range dictated by § 4B1.2(a)(2)). This Court has never indicated that the subsequent discretion of *another* criminal justice actor is sufficient to counteract the danger of arbitrary and discriminatory enforcement created by vague laws. Nor, given the "indeterminacy of the wide-ranging inquiry required by the residual clause," *Johnson*, 135 S. Ct. at 2557, does it matter that the sentencing judge might disregard the probation officer's recommendation when taking a fresh look at § 4B1.2(a)(2)'s applicability.

The rationale underlying the notice component of the vagueness doctrine also extends to the Guidelines. The reason for the notice requirement is to let ordinary

people know what they may do without risking punishment, *Grayned*, 408 U.S. at 108-09, as well as the consequences of engaging in prohibited conduct, *Batchelder v. United States*, 442 U.S. 114, 123 (1979). The Guidelines play a central role in establishing reasons for increasing a person's sentence. They currently operate as the "essential framework" for sentencing. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016).

Although the Guidelines are no longer mandatory, they have considerable influence on sentencing determinations because of the procedures courts must follow in imposing sentence. *Peugh*, 133 S. Ct. at 2083. District courts "must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Id.* Incorrectly calculating the Guidelines range "constitutes procedural error" that generally requires resentencing, and if a district court imposes a non-Guidelines sentence it must provide a justification "sufficiently compelling to support the degree of the variance." *Id.* Moreover, appellate courts assess the reasonableness of sentences by reference to the Guidelines. *Id.* Because of their significant effect on sentences, the Due Process Clause demands that the Guidelines, just like statutory sentencing enhancement provisions, provide adequate notice to defendants of the conduct that will result in an enhancement.

The Eleventh Circuit's contrary conclusion in *United States v. Matchett*, 802 F.3d 1185 (11th Cir. 2015), was based on a misunderstanding of this Court's

vagueness decisions. *Matchett* claimed that a Guideline does not unconstitutionally deprive defendants of notice because "'defendants cannot rely on [the Sentencing Guidelines] to communicate the sentence that the district court will impose.'" *Matchett*, 802 F.3d at 1194 (quoting *United States v. Tichenor*, 683 F.3d 358, 365 (7th Cir. 2012)). But statutes establishing mandatory minimum sentences also do not "communicate the sentence that the district court will impose" because a judge may impose a sentence above the mandatory minimum. Yet *Johnson* invalidated a statute setting a mandatory minimum sentence on vagueness grounds. Requiring specificity for statutes setting mandatory minimum sentences merely allows a defendant to better predict her punishment. *See Alleyne v. United States*, 133 S. Ct. 2151, 2161 (2013). The same is true for the advisory Sentencing Guidelines.

Nor, contrary to the Eleventh Circuit's conclusion, does this Court's decision in *Irizarry v. United States*, 553 U.S. 708 (2008), establish that the Due Process Clause permits vague Sentencing Guidelines that do not provide notice of the grounds for enhancements. *Irizarry* resolved a notice question that is irrelevant to the notice inquiry under the vagueness doctrine.

The Due Process Clause imposes two separate notice requirements. *See* Carissa Byrne Hessick & F. Andrew Hessick, *Procedural Rights at Sentencing*, 90 NOTRE DAME L. REV. 187, 210 (2014) (discussing the two types of notice). First, due process requires that the law inform the public, *ex ante*, of what conduct is prohibited and the consequences for engaging in that

conduct. *See, e.g.*, *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."). Second, even if the law clearly notifies the public about prohibited conduct and penalties, due process requires certain procedural protections during adjudication. This "adversarial notice" requires the government to provide a defendant with notice of the allegations against her and an opportunity to respond to those allegations. *See, e.g.*, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (noting that "at a minimum" the Due Process Clause "require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

The vagueness doctrine derives from the first kind of notice required by the Due Process Clause. It requires laws to notify the *public at large* of what conduct is prohibited and the penalties for engaging in that conduct. *Irizarry* involved the second kind of notice – the sort of notice that is required during particular adjudications. There, this Court held that, after *Booker*, a sentencing court is not required to notify *a particular defendant in a particular case* that it is contemplating imposing a sentence above the Guidelines range. *See, e.g.*, *Irizarry*, 553 U.S. at 715. *Irizarry* did not address the first type of notice – what degree of notice a Guideline must provide *ex ante* to the public at large to comply with the Due Process Clause. *Matchett* was

therefore incorrect to conclude that *Irizarry* settles the notice question at issue in vagueness cases. *See United States v. Pawlak*, 822 F.3d 902, 909-10 (6th Cir. 2016).

II. Any Ruling That § 4B1.2(A)(2) Is Unconstitutionally Vague Applies Retroactively

Under *Teague v. Lane*, 489 U.S. 288 (1989), "courts must give retroactive effect to new substantive rules of constitutional law," while new rules of criminal procedure generally do not apply on collateral review. *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016). "'A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes.'" *Welch v. United States*, 136 S. Ct. 1257, 1264-65 (2016) (quoting *Schriro v. Summerlin*, 542 U.S. 347, 353 (2004)).

A determination that § 4B1.2(a)(2)'s residual clause is unconstitutionally vague is a substantive ruling. That rule alters the class of persons who receive additional punishment under the Sentencing Guidelines. That rule would hold that the Constitution does not permit a court to sentence a defendant based on whether the defendant engaged in "conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a)(2) (2014). Before the determination that the Guideline is unconstitutional, a defendant whose career offender designation depended on § 4B1.2(a)(2)'s residual clause would receive a significant sentencing enhancement under that

Guideline. After the determination, the defendant could not receive that enhancement.

Furthermore, a determination that § 4B1.2(a)(2)'s residual clause is unconstitutionally vague is a substantive ruling because it creates a "significant risk" that a defendant "faces a punishment that the law cannot impose upon him." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)). An otherwise permissible punishment is unlawful if it was based on an unconstitutional consideration, including an unconstitutionally vague Guideline. Because the Guidelines serve as the lodestar and the essential framework for federal sentencing, there is a significant risk that defendants who were sentenced under § 4B1.2(a)(2)'s residual clause received additional prison time as a direct result of that Guideline.[4]

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[4] The now-advisory Guidelines are a recent development which resulted from a Court-ordered remedy in *United States v. Booker*, 543 U.S. 220 (2005). Because the advisory Guidelines are of recent vintage, there is no perfectly analogous rule that both invalidated a similarly advisory – but forceful and often controlling – sentencing regime, and that was available on collateral review. But that should not obscure the key questions for retroactivity, which include whether the Guideline imposes punishment or creates a significant risk of additional punishment. How the advisory Guidelines actually function and the effects of invalidating § 4B1.2(a)(2)'s residual clause are the kinds of "prudential considerations" that inform retroactivity analysis. *Danforth v. Minnesota*, 552 U.S. 264, 278 & n.15 (2008). These same considerations also mean that making a rule invalidating § 4B1.2(a)(2)

A. Invalidating A Guideline As Unconstitutionally Vague Is A Substantive Rule Because It Alters The Class Of Persons That The Law Punishes

Welch v. United States established that a rule holding that a defendant cannot receive an increased punishment based on a provision that is unconstitutionally vague is a substantive rule. In *Welch*, this Court made retroactive *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Johnson* invalidated the so-called residual clause of the ACCA, which subjected certain federal firearm defendants to a fifteen-year mandatory minimum sentence. *Welch* found that "*Johnson* changed the substantive reach of the Armed Career Criminal Act, altering the range of conduct or the class of persons that the Act punishes." *Welch*, 136 S. Ct. at 1265 (internal quotation marks and alterations omitted).

Welch further explained that a rule may be substantive because of the *effects* of that rule. *See, e.g.*, 136 S. Ct. at 1265 ("*Johnson affected* the reach of the underlying statute.") (emphasis added); *id.* ("[T]his Court has determined whether a new rule is substantive or procedural by considering the *function* of the rule, not its underlying constitutional source.").

The effect of invalidating § 4B1.2(a)(2)'s residual clause is clear – it alters the class of persons who are

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retroactive comports with "the purposes for which the writ of habeas corpus is made available." *Mackey v. United States*, 401 U.S. 667, 682 (1971) (Harlan, J., concurring).

subject to heightened punishment under § 4B1.2(a)(2). Applying § 4B1.2(a)(2) increases defendants' criminal history score, and consequently imposes additional punishment on defendants under the Guidelines. The effect of invalidating § 4B1.2(a)(2)'s residual clause would be to limit the class of persons who are subject to additional punishment under § 4B1.2(a)(2). Invalidating § 4B1.2(a)(2)'s residual clause is a substantive rule because "[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Welch*, 136 S. Ct. at 1264-65 (internal quotation marks omitted).

Like other Guidelines that increase a defendant's Guideline sentencing range, § 4B1.2(a)(2)'s residual clause imposes punishment. The higher sentencing range imposed by § 4B1.2(a)(2)'s residual clause is the starting point for sentencing, and district courts must remain cognizant of the range throughout sentencing. The higher sentencing range is also the benchmark according to which a defendant's sentence is judged on appeal. *See supra* Part I. That is why this Court held that the Guidelines are subject to the prohibition on *ex post facto* laws in *Peugh v. United States*, 133 S. Ct. 2072 (2013). The decision in *Peugh* determined that the Guidelines fell within a well-established "category of *ex post facto* laws, those that 'chang[e] the punishment, and inflic[t] a greater punishment, than the law annexed to the crime, when committed.'" 133 S. Ct. at 2081 (quoting *Calder v. Bull*, 3 U.S. (Dall.) 386, 390 (1789)). And in rejecting the United States' argument that the Guidelines "do not have adequate legal force

to constitute an *ex post facto* violation" this Court "detailed all of the ways in which the federal sentencing regime after *Booker*" has "achieve[d] its 'binding legal effect.'" *Id.* at 2086, 2087 (quoting Brief for United States 22).

B. Invalidating A Guideline As Unconstitutionally Vague Is A Substantive Rule Because It Creates A Significant Risk That a Defendant Faces Unlawful Punishment

A rule is substantive if that rule creates a "'*significant risk* that a defendant . . . ' faces a punishment that the law cannot impose upon him." *Schriro*, 542 U.S. at 352 (quoting *Bousley*, 523 U.S. at 620) (emphasis added). There is little doubt that § 4B1.2(a)(2)'s residual clause created a significant risk of unlawful punishment for defendants. Indeed, there is no doubt that Petitioner would have received significantly less punishment if not for the unconstitutionally vague language of § 4B1.2(a)(2); the district court judge in this case explicitly said so. JA 149 (noting that the record "reflects (and is consistent with undersigned's recollection) that but for the minimum offense levels assigned by the Sentencing Commission, the Court would not have imprisoned Beckles for 360 months, a term substantially greater than a sentence within the [non-enhanced] range of 262 to 327 months").

First, all sentences that depended on § 4B1.2(a)(2)'s residual clause constitute unlawful sentences, and

thus punishment that the law cannot impose. Punishment is unlawful if it is imposed in violation of the Due Process Clause's prohibition on vague laws. *Welch*, 136 S. Ct. at 1266-67; *Johnson* 135 S. Ct. at 2556-57. Thus, a ruling that § 4B1.2(a)(2)'s residual clause is unconstitutionally vague would mean that defendants whose career offender designations depended on that clause received unlawful sentences – sentences that were imposed in violation of the Due Process Clause. Those defendants' sentences were based on a Guideline provision "so shapeless" its application amounted to "only guesswork."[5] *Johnson*, 135 S. Ct. at 2560.

A sentence based on an unconstitutional consideration is unlawful even if it falls within an otherwise lawful statutory sentencing range. *See generally* Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CAL. L. REV. 47, 54-56 (2011) (collecting "substantive limitations on what courts may consider in imposing sentence"). A judge may not impose a sentence based on an unconstitutional consideration even if the same sentence could have been imposed without the unlawful consideration. *Compare* Reply Br. of United States,

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[5] Indeed, one of Justice Scalia's opinions calling for this Court to invalidate the ACCA residual clause as "unconstitutionally vague" recognized as much: The opinion named a case involving the interpretation of the *Guideline*'s residual clause and criticized the court of appeals for "its apparent view that Oliver Twist was a violent felon." *Derby v. United States*, 564 U.S. 1047, 131 S. Ct. 2858, 2859 (2011) (Scalia, J., dissenting from denial of cert.) (criticizing *United States v. Jarmon*, 596 F.3d 228 (4th Cir. 2010)).

Welch v. United States, No. 15-6418, at 9 (2016) ("*Johnson* is not retroactive in guidelines cases. The invalidation of the residual clause in [the] Guidelines . . . would not (and could not) alter the statutory boundaries for sentencing set by Congress."). Sentences that fall within the permissible sentencing range have been reversed when they were based on materially untrue information, *United States v. Tucker*, 404 U.S. 443, 447-48 (1972), when imposed because a defendant exercised her right to appeal, *North Carolina v. Pearce*, 395 U.S. 711, 723-25 (1969), or when based on a defendant's race or nationality, *United States v. Kaba*, 480 F.3d 152, 156 (2d Cir. 2007). It is immaterial that judges in those cases could have imposed the same sentences for different reasons. A sentence is unlawful if it was based on an unconstitutional consideration, including an unconstitutionally vague Guideline. Accordingly, career offenders who were sentenced based on an unlawful consideration – the invalid residual clause – do not have "lawful" sentences merely because they could have received their same sentences *without* the unlawful consideration.

Therefore, invalidating § 4B1.2(a)(2)'s residual clause would create a class of prisoners who received unlawful sentences – sentences that included punishment that was imposed in violation of the Due Process Clause's vagueness doctrine. Because judges have discretion to impose sentences outside the Guidelines range, *see United States v. Booker*, 543 U.S. 220 (2005), a defendant sentenced after a determination that § 4B1.2(a)(2)'s residual clause is unconstitutionally

vague could, in theory, receive the same sentence as a defendant sentenced before that determination.[6] But the mere possibility that *some* judges *might* impose the same sentence on *some* defendants does not mean that a rule invalidating § 4B1.2(a)(2)'s residual clause is not a substantive rule.

A sentence is not lawful merely because that same sentence could have been imposed in a constitutional manner. That is why this Court held that the ruling in *Johnson* was retroactive even though Congress could have prescribed the same punishment had it written a more precise statute. *Welch*, 136 S. Ct. at 1267 (rejecting the argument "that *Johnson* is not substantive because it does not limit Congress' power: Congress is free to enact a new version of the residual clause that imposes the same punishment on the same persons for the same conduct, provided the new statute is precise enough to satisfy due process").

Second, there is a "significant risk" that many defendants sentenced under § 4B1.2(a)(2)'s residual clause received additional prison time because of that clause, and this too constitutes punishment that the law cannot impose. *Montgomery v. Louisiana*, 136

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[6] This makes a finding that § 4B1.2(a)(2) is impermissibly vague different than the finding that ACCA is impermissibly vague. Defendants whose sentences depended on ACCA's residual clause could not have received the sentence imposed on them in the absence of ACCA's residual clause because ACCA increased these defendants' mandatory minimum sentence above the statutory maximum sentence they otherwise could have received.

S. Ct. 718 (2016), illustrates why a rule invalidating § 4B1.2(a)(2)'s residual clause would be substantive.

Montgomery made the ruling in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), retroactive. *Miller* held that the Eighth Amendment forbids the mandatory imposition of life without parole sentences on juveniles. *Miller*, however, explicitly left open the possibility that a judge could, in some cases, impose a life without parole sentence on a juvenile defendant. *See* 132 S. Ct. at 2471 ("Our decision does not categorically bar a penalty for a class of offenders. . . . [It] mandates only that a sentencer follow a certain process . . . before imposing a particular penalty."). *Montgomery* nonetheless made *Miller* retroactive, recognizing that *Miller* barred life without parole for all "but the rarest of juvenile offenders." 136 S. Ct. at 734. Making *Miller* retroactive was necessary to vindicate the Eighth Amendment rights of those juvenile defendants who would receive shorter sentences under *Miller*.

The same logic applies to the Guidelines. Given the role that the Guidelines play in federal sentencing, there is a "significant risk" that a defendant who was sentenced under § 4B1.2(a)(2)'s residual clause is now "fac[ing] a punishment that the law cannot impose on him." *Schriro*, 542 U.S. at 352. Any ruling that § 4B1.2(a)(2)'s residual clause is unconstitutionally vague must be applied retroactively to vindicate the due process rights of those defendants who will receive shorter sentences when § 4B1.2(a)(2) is not applied to them.

Although district court judges are permitted to sentence outside of the Guidelines range, the Guidelines "range is intended to, and usually does, exert controlling influence on the sentence that the court will impose." *Peugh*, 133 S. Ct. at 2085; *see also Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016) ("The Commission's statistics demonstrate the real and pervasive effect the Guidelines have on sentencing.").[7] The Guidelines "anchor both the district court's discretion and the appellate review process." *Id.* at 2087. District court judges must begin the sentencing process by calculating the applicable Guideline range, and that range serves as the starting point both for the district court to explain any deviation from the range

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[7] There is some evidence that judges vary more from the career offender Guideline than other Guidelines. *See* Statement of Molly Roth On Behalf of the Federal Community and Public Defenders, U.S. Sentencing Comm'n Public Hearing on Proposed Amendments to Definitions of Crimes of Violence (Nov. 5, 2015) at 13, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/FPD.pdf (estimating that only 27.5% of career offenders sentenced within the Guidelines range). However, the rate of within-Guideline sentences for career offenders roughly tracks the general rate of within-Guideline sentences overall in the cases where the government recommended a below-Guideline sentence are excluded (25.9% versus 20%).

In any event, the prevalence of within-Guidelines sentences need not dictate the result in this case. Regardless whether this Guideline was followed in 95% of cases or in only 5% of cases, the ruling should be made retroactive because even when a defendant receives a sentence outside of the Guidelines range, "*the Guidelines are in a real sense the basis for the sentence.*'" *Peugh*, 133 S. Ct. at 2083 (quoting *Freeman v. United States*, 131 S. Ct. 2685, 2692 (2011) (plurality opinion)).

and for the appellate court to review the appropriateness of that deviation. *Gall v. United States*, 552 U.S. 38, 49-51 (2007). That is why this Court has said that, even when a defendant receives a sentence outside of the Guidelines range, "'*the Guidelines are in a real sense the basis for the sentence.*'" *Peugh*, 133 S. Ct. at 2083 (quoting *Freeman v. United States*, 131 S. Ct. 2685, 2692 (2011) (plurality opinion)) (emphasis in original).

Given that the Guidelines are the basis for all federal sentencing – even for sentences that vary from the Guidelines' range – it would be a "rare[]" case indeed where the application of § 4B1.2(a)(2)'s residual clause had *no* effect on a defendant's sentence.[8] And making the rule invalidating the Guideline retroactive is necessary to ensure that those defendants whose sentences were increased by § 4B1.2(a)(2)'s residual clause "have not suffered the deprivation of a substantive right." *Montgomery*, 136 S. Ct. at 734. "*Any* amount of additional jail time has . . . significance," not merely that amount which exceeds the statutory maximum. *Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012) (quoting *Glover v. United States*, 531 U.S. 198, 203 (2001) (emphasis added)). Whether meted out by statute or by a Guideline, additional jail time constitutes punishment, and additional jail time that results from

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[8] Indeed, if the Guidelines range had *no* effect on a defendant's sentence, then the sentencing judge would have failed to impose an appropriate sentence under 18 U.S.C. § 3553(a), which requires judges to consider the Guidelines range when determining the particular sentence to be imposed. *See* 18 U.S.C. § 3553(a)(4).

an unconstitutional law is punishment that the law cannot impose.

C. Invalidating A Guideline As Unconstitutionally Vague Is Not A Procedural Rule

Unlike substantive rules, "[p]rocedural rules . . . 'regulate only the *manner of determining* the defendant's culpability.'" *Welch*, 136 S. Ct. at 1265 (quoting *Schriro*, 542 U.S. at 353). *Schriro v. Summerlin*, for example, declined to make the ruling in *Ring v. Arizona*, 536 U.S. 584 (2002) – that a jury, rather than a judge must find facts necessary to impose a capital sentence – retroactive. But *Ring* involved only the allocation of power between judge and jury; it "did not alter the range of conduct Arizona law subjected to the death penalty." *Schriro*, 542 U.S. at 353.

A ruling that § 4B1.2(a)(2)'s residual clause is vague is not procedural. Invalidating § 4B1.2(a)(2) would "affect[] the reach" of the Guidelines "rather than the judicial procedures by which" the Guidelines are applied. *Welch*, 136 S. Ct. at 1265. A determination that § 4B1.2(a)(2)'s residual clause is vague prohibits courts from applying that Guideline at all; "'even the use of impeccable factfinding procedures could not legitimate' a sentence based on that clause." *Welch*, 136 S. Ct. at 1265 (2016) (quoting *United States v. United States Coin & Currency*, 401 U.S. 715, 724 (1971)).

The government attempts to paint the Guidelines as merely procedural, arguing that a "substantive sentencing rule is one that changes the lawful boundaries of punishment, not a rule that alters the factors that a sentencer may consider in imposing a discretionary sentence within an authorized range." Br. in Opp., *Jones v. United States*, No. 15-8629, at 21 (2016). That argument, however, mischaracterizes the Guidelines. The Guidelines are not mere "factors" that a sentencer "may" consider; they *must* be considered by judges when imposing sentences. *See Gall*, 552 U.S. at 49-50; *see also* 18 U.S.C. § 3553(a). Any sentence imposed on a defendant designated as a career offender is based on, and imposed under, § 4B1.2(a)(2). *Peugh*, 133 S. Ct. at 2083.

This Court's prior retroactivity decisions are not to the contrary. *Lambrix v. Singletary*, 520 U.S. 518 (1997), declined to make the rule announced in *Espinosa v. Florida*, 505 U.S. 1079 (1992), retroactive. *Espinosa* invalidated a capital sentence that was imposed after a jury did not receive an appropriately limited construction of an aggravating factor it considered when formulating an advisory sentence recommendation to the judge. *See Lambrix*, 520 U.S. at 525-26. But *Espinosa* did not invalidate the aggravating factor that went into the jury's sentencing recommendation. In *Espinosa*, while the *jury* did not receive an appropriately limited construction, the *trial judge* did,[9] and the

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[9] This is another difference between *Espinosa* and the question in the case at bar: If § 4B1.2(a)(2)'s residual clause is invalid

trial judge, who imposed the ultimate sentence, did so based on an appropriately narrowed construction of the aggravating factor. *Espinosa* therefore concerned only the *processes* for reaching the court's ultimate sentence; the judge in that case did not impose a sentence pursuant to an invalid provision of law that established the defendant's eligibility for additional punishment. In any case, *Lambrix* predates this Court's more recent decisions in *Schriro*, *Montgomery*, and *Welch*, which have further clarified when a rule is substantive.[10]

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under the vagueness doctrine, then there is no possible narrowing construction that could potentially cure its application.

[10] Other early retroactivity cases are similarly inapposite. *Graham v. Collins*, 506 U.S. 461 (1993), held that the rule petitioner sought – that the State violated the Eighth and Fourteenth Amendments by not permitting the jury to consider evidence of his youthfulness, among other factors – was a new, procedural rule. *Graham* found that the jury *could* have considered the mitigating evidence in petitioner's case. *See* 506 U.S. at 475 ("Graham's mitigating evidence was not placed beyond the jury's effective reach."). The rule petitioner sought in *Graham* was also not *facial invalidation* of Texas's capital sentencing scheme, and it therefore would not result in a "void" law. Here, by contrast, finding § 4B1.2(a)(2) invalid would result in a void law, meaning any sentence imposed under that Guideline is unlawful.

Beard v. Banks, 542 U.S. 406 (2004), held that a rule about *how* a jury could find capital mitigating factors – not unanimously – did not apply retroactively. That rule did not find any particular factor invalid. *Saffle v. Parks*, 494 U.S. 484 (1990), addressed a rule that purportedly "limited *the manner in which* . . . mitigating evidence may be considered," *id.* at 491, not whether a factor was invalid.

Some lower courts have concluded that a ruling invalidating a Guideline is a procedural ruling because a district court's calculation of the appropriate Guidelines range is reviewed on appeal for procedural reasonableness under *Gall v. United States*. *See, e.g.*, *Hallman v. United States*, No. 3:15-CV-00468, 2016 WL 593817, at *5 (W.D.N.C. Feb. 12, 2016); *United States v. Stork*, No. 15-389, 2015 WL 8056023, at *6 (N.D. Ind. Dec. 4, 2015). This wordplay elevates form – the description of one facet of *Gall*'s reasonableness review as procedural – over substance – how the Guidelines actually work to affect the sentences that are imposed. *See supra* Part II.B. It also ignores that Guidelines also play a role in *substantive* reasonableness review, as courts of appeals are required to consider "the extent of any variance from the Guidelines." *Gall*, 552 U.S. at 51.

D. The Mechanics of Resentencing Prisoners Would Not Unduly Burden The Federal Courts

The federal criminal justice system has the capacity to conduct resentencings in cases similar to Petitioner's. The precise number of individuals sentenced under § 4B1.2(a)(2)'s residual clause in federal prison is difficult to estimate, but there may be (very roughly) 24,000 prisoners sentenced as career offenders in

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Finally, *O'Dell v. Netherland*, 521 U.S. 151 (1997), did not address whether the "narrow right of rebuttal" in *Simmons* was a substantive rule. 521 U.S. 151, 167 (1997).

prison.[11] That number pales in comparison to the number of prisoners (38,242) who requested sentence reductions under recent retroactive amendments to drug-related Guidelines.[12]

Moreover, not every prisoner sentenced as a career offender must be resentenced. The rule petitioner seeks in this case leaves intact the portion of § 4B1.2(a) that increases punishment based on controlled substance offenses. It also leaves intact two provisions that define what kinds of violent felonies provide a

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[11] The Sentencing Resource Counsel estimated that approximately 14,928 of the 16,444 prisoners sentenced as career offenders from 2008 through 2014 remain in prison. Sentencing Resource Counsel, Federal Public & Cmt'y Defenders, Data Analyses-Career Offenders, http://www.src-project.org/wp-content/uploads/2016/03/Effect-of-Career-Offender-Status-and-Number-Sentenced-2008-through-2014-Likely-Still-in-Prison.pdf. The average sentence for career offenders – at least after *Booker* – is approximately 147 months' (just over 12 years') imprisonment. U.S. Sentencing Comm'n, Quick Facts: Career Offender, available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender.pdf.

This average means that the typical prisoner sentenced under the career-offender Guideline will be in prison if he or she was sentenced during or after 2004. Extending the Sentencing Counsel's estimates back several years, there may be (very roughly) 24,000 prisoners sentenced as career offenders in prison. (15,000 + 2250x4 is 24,000.)

[12] U.S. Sentencing Comm'n, 2014 Drug Guidelines Amendment Retroactivity Data Report tbl. 1 (Apr. 2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20160407-Drug-Retro-Analysis.pdf.

basis for a career-offender designation – the enumerated-offense clause, which identifies specific crimes as violent crimes, and the element-of-force clause, which defines a violent crime as one that "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1), (a)(2) (2014). The Sentencing Commission has reported that "most" prisoners were designated career offenders "because of drug trafficking crimes."[13] The Commission's own calculation therefore means that fewer than 12,000 of the 24,000 career offenders would be eligible for resentencing, and some of those career offenders would not be eligible for resentencing because their designations depended on the enumerated-offense or the element-of-force clauses, not § 4B1.2(a)(2)'s residual clause.

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[13] *E.g.*, U.S. Sentencing Comm'n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 133 (2004), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf; *cf.* U.S. Sentencing Comm'n, Quick Facts: Career Offenders (2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY14.pdf ("74.1%" of career offenders "were sentenced for a drug trafficking offense"); U.S. Sentencing Comm'n, Report to the Congress: Career Offender Sentencing Enhancements 28 (Aug. 2016), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf (26.7 percent of prisoners sentenced in 2014 "had only drug trafficking convictions among their instant and prior offenses" and 60.6% "had a combination of drug trafficking and violent offenses").

Finally, the process for determining which prisoners should be resentenced would not unduly burden the federal courts. By all accounts, the workload from the retroactive drug Guideline amendments was managed well.[14] There is every reason to think the same would be true here. Many of the same procedures used to manage the workload from the drug Guideline amendments – such as expanding prisoner access to legal materials and presentence reports – could be employed in resentencing defendants who were sentenced under § 4B1.2(a)(2)'s residual clause.

The resentencings that would result from this case would also operate similarly to the sentence reductions under the retroactive drug Guideline amendments. After those amendments, courts imposed new sentences in light of the amended Guidelines ranges. Invaliding § 4B1.2(a)(2)'s residual clause would reduce some offenders' criminal history points, thereby yielding a new

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[14] Testimony of Judge Reggie B. Walton Presented to the U.S. Sentencing Commission on June 1, 2011 on the Retroactivity of the Crack Cocaine Guideline Amendment, U.S. Sentencing Comm'n (June 1, 2011) at 3, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Testimony_Reggie_Walton.pdf; *see also* Testimony of James E. Felman on behalf of the Am. Bar Ass'n before the U.S. Sentencing Commission for the Hearing Regarding Retroactivity of Amendments Implementing The Fair Sentencing Act of 2010, U.S. Sentencing Comm'n (June 1, 2011) at 4, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Testimony_ABA_James_Felman.pdf.

Guidelines range, and courts could likewise simply impose new sentences utilizing the new Guidelines range.

III. At A Minimum, Any Rule That § 4B1.2(A)(2) Is Unconstitutionally Vague Must Apply Retroactively To Those Defendants Who Were Sentenced Under Mandatory Guidelines

At a minimum, any rule that § 4B1.2(a)(2)'s residual clause is unconstitutionally vague must apply retroactively to defendants whose sentences were imposed when the Guidelines were not advisory. Prior to *United States v. Booker*, 543 U.S. 220 (2005), district courts were required to impose sentences under the Guidelines. Because the Guidelines effectively operated as mandatory statutes, *id.* at 233-34, there is no plausible argument to treat § 4B1.2(a)(2)'s residual clause any differently than the ACCA language that this Court invalidated in *Johnson*. *See, e.g.*, *In re Patrick*, ___ F.3d ___, 2016 WL 4254929, at *4 (6th Cir. Aug. 12, 2016).

Importantly, at the time Petitioner was sentenced, § 4B1.2(a)(2) was not treated as advisory in the Eleventh Circuit. Even after this Court decided *Kimbrough v. United States*, 552 U.S. 85 (2007), the Eleventh Circuit did not permit district court judges to sentence outside of the Guidelines range based on policy disagreements with § 4B1.2(a)(2). *See United States v.*

Vazquez, 558 F.3d 1224, 1227-29 (11th Cir. 2009).[15] Thus, in deciding whether a vagueness rule must apply retroactively to Mr. Beckles, this Court should not credit the government's arguments that § 4B1.2(a)(2) represented only "incorrect advice to the sentencing court" nor that "sentencing courts are free to vary from the range recommended by the career offender guideline based on a disagreement with the Commission's policy judgment." Br. in Opp., *Jones v. United States*, No. 15-8629, at 12, 16. That simply was not true in Mr. Beckles' case. Nor was it true in many cases from the First, Seventh, and Fourth Circuits, which "initially held that sentencing judges had no authority to reject" § 4B1.2(a)(2). Hon. Thomas M. Hardiman & Richard L. Heppner Jr., *Policy Disagreements with the United States Sentencing Guidelines: A Welcome Expansion of Judicial Discretion or the Beginning of the End of the Sentencing Guidelines?*, 50 DUQ. L. REV. 5, 16 (2012).

IV. How The Court Decides This Case Affects The Timeliness Of Prisoners' § 2255 Motions

This Court should clarify that motions asserting a right recognized in this case are not time barred.

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[15] This Court vacated the judgment in *Vazquez* after the government confessed error. 558 U.S. 1144 (2010). The Eleventh Circuit has not yet decided whether district court judges are now authorized to disregard § 4B1.2(a)(2) based on a policy disagreement. *See United States v. Bradley*, 409 F. App'x 308, 312 (11th Cir. 2011) (stating "we need not address the implications of our vacated decision in *Vazquez*").

The applicability of several Anti-terrorism and Effective Death Penalty Act (AEDPA) restrictions turns on what "right" is "asserted" by a prisoner. AEDPA's statute of limitations, for example, runs from "the date on which *the right asserted* was initially recognized by the Supreme Court." 28 U.S.C. § 2255(f)(3) (emphasis added).

What this Court identifies as the "right" in this case therefore affects when the statute of limitations expires for cases similar to Petitioner's. For example, if this Court accepts Petitioner's argument that the right at issue in this case is *Johnson* – and nothing more – then the statute of limitations has already expired. *Johnson* was decided June 26, 2015, so the statute of limitations expired June 26, 2016.[16] If this Court does not explicitly clarify that it is recognizing a new right in this case – one that restarts the statute of limitations – there is a risk that some courts will conclude that claims similar to Petitioner's are time barred because the right this Court recognized was based, in part, on *Johnson*.

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[16] The statute of limitations is subject to equitable tolling, *Holland v. Florida*, 560 U.S. 631 (2010), including for actual innocence, *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013). A favorable decision in Petitioner's case *could* mean that prisoners sentenced under the career-offender Guideline are actually innocent of their sentences. *See, e.g.*, Leah M. Litman, *Residual Impact: Resentencing Implications of* Johnson's *Potential Ruling on ACCA's Constitutionality*, 115 COLUM. L. REV. SIDEBAR 55, 65-73 (2015) (showing linkage between substantive rules and actual innocence).

But if this Court instead clarifies that it is recognizing a new right in this case, the statute of limitations will restart on the date on which that right is announced. One recent concurrence highlighted this possibility:

> [T]he statute of limitations for § 2255 motions based on *Johnson may* expire in the next few days. Of course, if the Supreme Court overrules *Matchett*, that new case *could* start a new one-year clock. If that happens, the dates of the one-year statute of limitations will turn in part on whether *Johnson*'s voiding of the identical § 4B1.2(a)(2) language was "apparent to all reasonable jurists."

In re McCall, ___ F.3d ___, 2016 WL 3382006, at *2 (11th Cir. June 17, 2016) (Martin, J., concurring) (citation omitted) (emphasis added).

Despite the public defenders' Herculean efforts, many prisoners did not file § 2255 motions prior to June 26. Precedent in some circuits squarely foreclosed successive motions, even by prisoners sentenced under ACCA; in these circuits, prisoners could not file before April 18 when *Welch* was announced. The Eleventh Circuit's precedent *still* forecloses successive and initial § 2255 motions by prisoners sentenced under the Guidelines, and that court has continued to deny authorization to file successive § 2255 motions after certiorari was granted in this case. *See, e.g.*, *In re Anderson*, ___ F.3d ___, 2016 WL 3947746 (11th Cir. July 22, 2016). Some prisoners may have elected not to file based on these cases, and these prisoners, as well

as those whose successive motion applications were recently denied, would need to file requests for authorization after June 26.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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